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1893.

THE

LAW REPORTS

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HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

EDITOR OF HOUSE OF LORDS REPORTS—A. P. STONE, *Barrister-at-Law.*

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House of Lords—Scotch and Divorce Appeals and Scotch Peerage Cases . . .	GERALD J. WHEELER,	*Barrister-at-Law.*
Privy Council Appeals (including Appeals from Ecclesiastical Courts)	HERBERT COWELL,	*Barrister-at-Law.*

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JUDGES AND LAW OFFICERS.

MEMORANDA.

1892. *Aug.* 25. THE RIGHT HONOURABLE ALEXANDER BURNS SHAND, *formerly a Judge of the Scottish Court of Session, was created a Peer by the title of* BARON SHAND, *of Woodhouse, in the county of Dumfries.*

In the Long Vacation after Trinity Sittings, THE HONOURABLE GEORGE DENMAN *resigned his office as one of the Justices of the High Court of Justice. He was afterwards sworn of the Privy Council.*

Oct. 28. WILLIAM RANN KENNEDY, *one of Her Majesty's Counsel, was appointed one of the Justices of the High Court of Justice in the place of* THE HONOURABLE GEORGE DENMAN, *and was afterwards Knighted.*

ERRATA.

Page	*Line*	*For*	*Read*
24	19 from top	"Hollams"	"Holman."
114	19	"follow another"	"follow one another."
357	3 from top	"Lord Halsbury, L.C.'	"Lord Halsbury."
358 359	Margin of pages		

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)
1892
Nov. 10.

THE ATTORNEY GENERAL . . . . APPELLANT;

AND

SIR GEORGE ELIOTT MEYRICK TAPPS GERVIS MEYRICK, BARONET, AND OTHERS . . . . RESPONDENTS.

Inclosure Act—Commonable Lands purchased by Railway Company—Rights of Turbary—Allotment of Waste Lands to Lords of Manor in Trust—Trust for Benefit of Occupiers of Cottages—Rights of Lord of Manor as Owner of the Soil.

Prior to 1802 the occupiers of certain cottages were accustomed to cut turf on large tracts of commonable and waste lands of a manor. In that year an Inclosure Act was passed by which Commissioners were empowered to allot to the lord in trust for the occupiers of the cottages, in lieu of their rights or pretended rights of cutting turf, portions of the waste for a turf common, to be managed as the lord and the churchwardens and overseers should order and not to be depastured. The Commissioners, by their award made in 1806, allotted to the lord, in trust for the occupiers for the time being of the cottages, several acres of waste for a turf common.

A railway company took for the purposes of their undertaking part of the land allotted as a turf common, and the purchase-money was paid into Court. On a petition as to the distribution of the fund:—

Held, affirming the decision of the Court of Appeal (38 Ch. D. 520), that upon the true construction of the Act the lord of the manor was not deprived of his rights as owner of the soil in the turf common, but was entitled to so much of the purchase-money as represented the value of those rights.

APPEAL from an order of the Court of Appeal (1) varying an order of Stirling J. reported as *In re Christchurch Inclosure Act* (2).

The Christchurch Inclosure Act 1802 (42 Geo. 3 c. xliii.) recited that there were within the parish of Christchurch and parish or chapelry of Holdenhurst in the county of Southampton certain commonable lands and waste grounds, and that the lands and grounds of the several proprietors in the said commonable lands were divided into small parcels intermixed with each other, and the said waste grounds consisted of large tracts of commonable pasture land partly covered with furze and heath of very little value and in their present situation were incapable of any considerable improvement, but if the same or certain parts thereof were divided into specific shares and allotted unto and amongst the several owners or proprietors thereof and persons interested therein in severalty in lieu of and in proportion to their respective lands, rights of common and other rights and interests, the same would be more convenient to them and might be considerably improved.

By sect. 13 the Commissioners were authorized and required "to set out and allot unto and for the lords of the several manors respectively in which the waste grounds are situate in trust for the occupiers for the time being of" certain "cottages in lieu of their rights or pretended rights or custom of cutting turves, so much and such parts of the waste grounds in such respective tithings manors or liberties as the Commissioners shall think proper for a turf common" (of a certain acreage) "as shall in the judgment of the Commissioners be fit and proper for supplying turves for fuel for the use of such cottages or tenements," those allotments to be managed and the turf arising therefrom to be cut taken and used by the occupiers of such cottages in such quantities and at such times and in such manner as the lords of the manors respectively and the churchwardens and overseers of the poor acting for or within the manor, or the major part of them, should order and appoint: the turf common not to be depastured by cattle or sheep; power being given to the lords of the manor for the purpose of their powers of management to appoint agents or proxies.

---

(1) 38 Ch. D. 520.

(2) 35 Ch. D. 355.

Section 15 required the Commissioners "to set out and allot such plots in quantity of the said waste lands and grounds intended to be divided and allotted which shall so remain as hereinbefore is mentioned as in the judgment of the said Commissioners shall be equal in value to one-eighteenth part thereof unto the several lords of the manors within which the said waste grounds are situate, in lieu of and in full compensation for their several rights and interests in and to the soil of the said waste grounds respectively which within such manors shall be awarded by the said Commissioners to be divided and allotted under and by virtue of this Act."

Section 16 enacted that the Commissioners "shall divide, set out and allot all such parts of the residue of the said commonable lands and waste grounds intended by this Act to be divided and allotted as shall in their judgment be fit and proper to be divided, allotted and enclosed or to be held in severalty unto and for the several owners, proprietors, lessees and customary tenants thereof and other persons interested therein, in proportion to their several and respective lands, common rights and all other rights whatsoever in over and upon the same, which said allotments shall be in full bar of and compensation for all rights of the several parties in, over and upon such of the commonable lands and waste grounds as shall be divided and allotted as aforesaid." . . . .

By an award made under the Act in 1805, the Commissioners set out and allotted to the lord of the manor in trust for the occupiers of certain cottages certain lands as a turf common in the terms of sect. 13, and made other allotments under the Act. In 1884 the London and South Western Railway Company under statutory powers took a portion of the turf common and the purchase-money was paid into Court.

A petition having been presented to obtain the decision of the Court as to the rights of the various persons interested in the purchase-money, Stirling J. held (inter alia) that under the allotment to the lord of the manor of a turf common in trust for the occupiers of the cottages the lord was not deprived of his ownership of the soil, but was entitled to a proportion of the purchase-money as owner of the soil, and made an order accordingly (1). The Court of Appeal (Cotton, Lindley and Bowen L.JJ.) affirmed this part of the decision of Stirling J., but being of opinion that the trusts declared by the Act in favour of the occupiers were a charitable trust varied the order accordingly (2). None of the questions discussed in the Courts below were raised on this appeal except the above question as to the rights of the lord as owner of the soil in the turf common.

Sir *Charles Russell* A.G. and *Rigby* S.G. (*Ingle Joyce* with them) for the appellant:—

The question turns upon the terms of sect. 13 of the Inclosure Act, which empowers the Commissioners to allot waste grounds to the lords of the manors in trust for the occupiers of cottages. Upon the true construction of the language used there is no beneficial interest in the land remaining in the lords of the manor. It is not now disputed that a charitable trust was created. That being so there is no resulting trust to the lords, but the whole property is stamped with the trust, and must be applied to charitable purposes: *Merchant Taylors' Company* v. *Attorney-General* (3). A saving clause in an Inclosure Act preserving the rights of the lord of the manor to the seignory and royalties preserves only rights of a manorial character, and not rights held by the lord as owner of the soil: *Sowerby* v. *Smith* (4). A conveyance of land in trust for a limited purpose does not imply a reservation for the benefit of the owner; ex. gr. a conveyance of land in trust for building a school, or for a public park. In such cases there is no reservation of the minerals or any other rights of the owner, even though the surface only be needed for the purpose of the trust. There is no resulting trust to the owner: the whole interest in the land is given for the trust. The dedication of land for a highway is not an analogous case. Upon the true construction of the Act the trust attaches to whatever is allotted. The words vesting the land in the lord are free from ambiguity; they would vest the land in the lord even if he had just before the Act passed sold the wastes to third persons. The allotment under sect. 15 of one-eighteenth to the lord was in lieu of his rights as owner of the soil, as appears by the terms of that section.

---

(1) 35 Ch. D. 355, 365.

(2) 38 Ch. D. 520.

(3) Law Rep. 6 Ch. 512.

(4) Law Rep. 9 C. P. 524, 532.

Bosanquet Q.C. and *Ribton*, for the lord of the manor, respondent, and

Kenyon Parker, and *J. K. Mackay*, for the Mayor, &c., of Bournemouth, respondents, were not heard.

LORD HERSCHELL, L.C. [after referring to the preamble of the Act, and the terms of sect. 13, proceeded as follows:—]

My Lords, the question in this case turns substantially upon the construction of the 13th section of the Christchurch Inclosure Act 1802. I do not think that your Lordships have to determine any general principle of construction; one must gather the intention of the Legislature from the provisions of the Act and the language used. It is contended by the appellant's counsel, and has been pressed upon your Lordships very forcibly by the Solicitor-General, that where land is conveyed upon a trust, even although the trust permits but a limited beneficial use of the land, and certainly does not exhaust all the means by which the land might be beneficially used, it does not at all follow that there is any resulting trust to the person who made the conveyance; that the whole of the land is dealt with, passes to and is vested in the trustees, and that nothing remains in the person who has created the trust. The learned counsel was right in saying that the same proposition would hold good of a declaration of trust of land, the legal estate of which remained in the person creating it. But when we are dealing with a legislative provision such as this, it is essential to look at the purpose and object of the statute, at its general purview, and the position of things at the time when the statute was passed. The purpose of the statute certainly was not to deprive the lord of any interest which he possessed in the land beyond the extent to which it was deemed necessary or expedient for the purpose of carrying out the main object of the Act. No doubt, so far as the Act was designed to pass to some person or persons other than the lord the entire beneficial use of the land, the purpose could only be carried out by depriving the lord of it; but the contention, on the part of the appellant, is that though the main object of the Act was to enable the land to be more beneficially used, it vested the property in the lord, in order that the commoners might have the enjoyment of the limited rights given to them, and divested the lord of all beneficial interest whatever.

It does not seem to me that such a scheme is in accordance with what appears to have been the purpose of the Act. Indeed, it is difficult to understand why the Legislature should have designed such a scheme, or why (if it was designed) it should have been given effect to by the language which has been used. If the purpose were to divest the lord of all beneficial interest, and to leave in him only the bare legal estate, why should the land be conveyed to the lord as trustee, upon such terms as are found in this Act, instead of upon terms which would have made it clear that the whole beneficial interest was to pass to the cottagers and none to remain in the lord? Looking at the preamble of the Act and the whole of sect. 13, there is nothing to prevent the conclusion—on the contrary, everything points to the conclusion—that the beneficial interest was intended to be in the lord, subject only to these turbary rights in the cottagers. The Commissioners are "required to set out and allot unto and for the lords of the several manors." That is not the language one would have expected if the lord was to be a bare trustee. It is language more appropriate to his possessing some of the beneficial interest. Having regard to the right which the lord had before, to the right which the tenants had before, to the general scheme of the Act, to the language used in sect. 13, to the language which one would have expected to find had the purpose been that which has been suggested,—looking at all these matters, I come to the conclusion that the true construction is that which has been placed upon the clause by the Court below.

H. L. (E.)
1892
ATTORNEY-GENERAL
v.
MEYRICK

My Lords, in my view the 15th clause does not throw much light upon the matter. I rather agree with the argument of the learned counsel for the appellant that the 15th clause is consistent with either view of the case, and that no conclusive argument one way or the other can be derived from it.

For these reasons I move your Lordships that the judgment of the Court below be affirmed, and this appeal be dismissed.

LORD WATSON:—

My Lords, I agree, and for the reasons which have been assigned by the Lord Chancellor. Having regard to the position of these parties and the intention of the Legislature as appearing from the language of the Act, I am satisfied that the trust created by sect. 13 does not take away the whole beneficial interest of the lord of the manor, but merely constitutes a right of turbary as a burden upon that interest.

LORDS MORRIS and FIELD concurred.

Order of the Court of Appeal affirmed, and appeal dismissed; no order as to costs.

Lords' Journals 10th November 1892.

Solicitors for appellant: *Hare & Co.*

Solicitors for respondents: *Crawley, Arnold & Co.; Peacock & Goddard for R. D. Sharp, Bournemouth.*

[HOUSE OF LORDS.]

H. L. (E.)
1892
Nov. 14.

THE BAUMWOLL MANUFACTUR VON CARL SCHEIBLER . . . . . . APPELLANTS;

AND

CHRISTOPHER FURNESS . . . . . RESPONDENT.

Ship—Charterparty—Bill of Lading—Liability of Owner of Chartered Ship on Bills of Lading signed by Master—Principal and Agent—Master and Servant.

The owner of a ship, registered as such and as the managing owner under the Merchant Shipping Act 1876, who has parted with the possession and control of the ship under a charterparty to the charterer, is not liable for the loss of goods shipped under bills of lading signed by the captain who is the servant of the charterer and not of the owner and who has no authority from the owner to pledge his credit, although the shipper of the goods has no notice of those facts.

The owner of a ship, registered as such and also registered as the managing owner under the Merchant Shipping Act 1876, let her by charterparty for a term of four months. The charterparty provided that the captain, officers and crew should be paid by the charterer, that the captain should be under the orders of the charterer as regards employment, agency or other arrangements; that the charterer should indemnify the owner from all liabilities arising from the captain signing bills of lading; and that the owner should maintain the ship in a thoroughly efficient state in hull and machinery for the service and should pay for the insurance on the ship.

The charterer took possession of the ship and appointed the captain, officers and crew, except the chief engineer who was appointed by the owner in exercise of the option given him by the charterparty. The charterer sent the ship to New Orleans, where goods were shipped under bills of lading some of which were signed by the captain and some by the agents of the charterer. Neither the captain nor the charterer's agents had any authority in fact from the owner to pledge his credit. The bills of lading contained no reference to the charterparty and the shippers had no notice of its terms. The goods having been lost at sea during the currency of the charter, owing (as was alleged) to the unseaworthiness of the ship, the shippers sued the owner for the loss:—

Held, affirming the decision of the Court of Appeal ([1892] 1 Q. B. 253), that the captain not being the servant or agent of the owner and having no authority to pledge his credit the owner was not liable.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Charles J. (2).

(1) [1892] 1 Q. B. 253.

(2) [1891] 2 Q. B. 310.

On the 13th of October 1888 an agreement was made between the respondent Furness and Gillchrest & Co. for the purchase of a vessel named the *Asia* (which was to be renamed the *Sultan*) by Gillchrest & Co. from Furness. The vessel had not been in use by Furness, and the arrangement in reality was one by which Gillchrest & Co., being desirous of purchasing this vessel, obtained the assistance of Furness in carrying out that scheme. The price was to be £13,500, to be paid by a deposit of £500 in cash on approval of a supplementary mortgage, and the balance by certain instalments on the transfer of the ship after the expiration of a charterparty of even date, made between Furness and Gillchrest & Co., signing as agents for the Mexican Gulf Steamship Company Limited (a company which Gillchrest & Co. were forming or intending to form), the charterparty being entered into for the purpose of bridging over the time until the Mexican Gulf Steamship Company or Gillchrest & Co. were in a position to carry out the purchase. The material portions of the charterparty (which was partly printed and partly written and which is set out in full in the report of the decision of Charles J. (1)) were as follows:—

Furness agreed to let and the steamship company to hire the steamship for four calendar months, "she being then tight, staunch, strong and every way fitted for the service (and with full complement of officers, seamen, engineers, and firemen for a vessel of her tonnage); to be employed in such lawful trades between ports in the United Kingdom or on the Continent, and in the United States, West Indies, and Gulf of Mexico, and within the limits of ordinary Lloyd's warranties, but no Suez Canal, as charterers or their agents shall direct, on the following conditions: That the charterers shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew; owner shall pay for the insurance on the vessel; maintain her in a thoroughly efficient state in hull and machinery for the service. That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, except those before stated." The charterers to "pay for the use and hire of the vessel at the rate of £750 per calendar month . . .; payment to be made in cash in advance monthly."

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(1) [1891] 2 Q. B. 310.

"That the whole reach, burthen, and passage accommodation of the ship (not being more than she can reasonably stow and carry) shall be at the charterers' disposal, reserving only proper and sufficient space for the ship's officers, crew, tackle, apparel, furniture, provisions and stores."

"The captain shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or in otherwise complying with the same. Owner has the option of appointing chief engineer to be paid by the charterers. If the charterers shall have reason to be dissatisfied with the conduct of the engineer the owners shall on receiving particulars of the complaint investigate the same; and if necessary make a change in the appointment when steamer in England."

"That the charterers undertake at the expiration of this charter to purchase the vessel for the sum of £13,500 as per contract dated the 13th of October, 1888."

"That the owners shall have a lien upon all cargoes and subfreights for freight or charter-money due under the charter; and charterers to have a lien on the ship for all moneys paid in advance and not earned."

Furness registered himself as the owner, and also as the managing owner of the ship under 39 & 40 Vict. c. 80. The ship was taken possession of by Gillchrest & Co. who appointed the master, officers and crew, except the chief engineer who was appointed by Furness in exercise of the option given him by the charterparty. All the wages were paid by Gillchrest & Co. They sent the ship to New Orleans where she was consigned by them to Ross, Keen & Co. as their agents. At New Orleans cotton was shipped by the appellants for Bremen under bills of lading, some of which were signed by Ross, Keen & Co. and some by the master. The bills of lading contained no reference to the charterparty, and the shippers had no notice of its terms. On the voyage from New Orleans the ship foundered and the cotton was lost owing (as was alleged) to unseaworthiness. The appellants having brought an action against Gillchrest & Co. and Furness for the loss of the cotton it was agreed that the question whether, assuming the loss to have been caused by unseaworthiness, Furness and Gillchrest & Co., or either and which of them, were liable to the plaintiffs for the alleged breach of duty and contract, should be tried before any other question.

At the trial before Charles J. without a jury Furness alone defended, Gillchrest & Co. not being represented. Charles J. found that Furness was liable to the plaintiffs, if they were the owners of the goods, for breach of duty and contract which it was alleged had been committed (1). This decision was reversed by the Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.) who made an order entering judgment for Furness (2).

Nov. 10, 11, 14. Sir *R. E. Webster* Q.C. and Sir *Walter Phillimore* (*Stubbs* with them) for the appellants:—

The contention for the appellants may be put in two propositions; first that the charterparty does not amount to such a demise or handing over possession of the ship as to absolve the owner from his liability on bills of lading signed by the master or his agents; secondly that even if the charterparty does amount to a demise or delivery of the possession of the ship the liability of the owner remains unless the shipper of the goods has notice of the terms of the charterparty. It is true that in this case the respondent did not appoint or pay the master, but that is not conclusive as to the master not being his servant or agent. By the charterparty the respondent agreed to maintain the ship in a thoroughly efficient state in hull and machinery for the service; and he was therefore liable for loss caused by unseaworthiness till the expiration of the charterparty. Where goods are shipped there is an absolute warranty by the owner that the ship is seaworthy, and if there is a breach of that warranty and loss results to the goods the owner is liable for that loss. The primâ facie liability for unseaworthiness might perhaps be modified if she was seaworthy when she started on the voyage and

(1) [1891] 2 Q. B. 310.

(2) [1892] 1 Q. B. 253.

became unseaworthy afterwards through the default of the charterer; but here the owner agreed to maintain her in a seaworthy state and is therefore liable for the consequences of her unseaworthiness. For his own protection the owner retained by the charterparty some of the rights and privileges of an owner, and therefore also some of the liabilities, and he cannot claim the freedom from liability to which an owner is entitled when he gets rid of all control over and interest in the ship. It makes no difference to the argument that the charterers also may be liable. It is clear that Furness understood that he was making himself liable, for he agreed by the charterparty to pay for the insurance on the vessel, and he in fact insured himself against claims for loss or damage to be caused to goods shipped on board the vessel. Also he provided by the charterparty for an indemnity by the charterers against all liabilities arising from the captain signing bills of lading. If the owner did not remain liable those clauses had no meaning. Again the charterparty gave the owner a lien upon all cargoes and sub-freights for freight or charter-money due under the charter; he cannot therefore assert that the charterparty was a demise or equivalent to a demise. There is no case where under such a charterparty the owner has been held free from liability for loss caused by unseaworthiness. In *Frazer* v. *Marsh* (1), which was relied on by the Court of Appeal, the question was whether the master had the authority of the owner to pledge his credit for necessaries in a home port, as distinguished from a foreign port where the master has authority to bottomry the ship for necessaries. Moreover in that case, as appears from the report in Campbell of Lord Ellenborough's judgment, the defendant was not the documentary owner when the necessaries were supplied. That case is therefore no authority for the present. As to the authority of a master to pledge his owner's credit where the exigency gives him no time to consult the owner, see the observations of Maule J. in *Mitcheson* v. *Oliver* (2). In *Colvin* v. *Newberry* (3), which was the strongest case against the appellants, it was held that the charterer and not the owner was liable on bills of lading signed

(1) 13 East, 238; 2 Camp. 517.

(2) 5 E. & B. at p. 440.

(3) 8 B. & C. 166; in Ex. Ch. 7 Bing. 190; in H. L. 1 Cl. & F. 283.

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by the master, but there there was a demise of the ship, the owner had parted altogether with the possession, and moreover the shippers had notice of and knew the terms of the charterparty. In the present case no notice of the charterparty was given to the shippers and they were not aware of its terms. The case falls within the authority of cases such as *The St. Cloud* (1) where Dr. Lushington held that the owner and not the charterer is liable for injury to goods shipped under a bill of lading signed by the master, if it is not proved that at the time of shipment the shipper had notice of the charter, "for primâ facie the master is the agent of the owner of the ship." To the same effect is the decision in *Sandeman* v. *Scurr* (2). Apart from the question of contract the owner is liable in tort for breach of duty in not providing a seaworthy ship: *Hayn* v. *Culliford* (3). There is strong evidence that Furness did not intend to demise the ship or part with complete possession, for he registered himself as owner, and also as managing owner under the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80) s. 36. That section enacts that "the name and address of the managing owner for the time being of every British ship registered at any port or place in the United Kingdom shall be registered at the custom-house of the ship's port of registry"; and that "where there is not a managing owner there shall be so registered the name of the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner; and any person whose name is so registered shall, for the purposes of the Merchant Shipping Acts 1854 to 1876, be under the same obligations and subject to the same liabilities as if he were the managing owner." A managing owner so registered is liable for the negligence or misfeasance of a person to whom he delivers the ship: *Steel* v. *Lester* (4); and see *Frazer* v. *Cuthbertson* (5). In cases under the earlier Registry Acts plaintiffs were often nonsuited, the mere fact of being registered as the owner being no evidence against the defendant; but sect. 38 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) provided that no person should be entitled to be registered

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(1) Br. & Lush. 4, 15.

(2) Law Rep. 2 Q. B. 86.

(3) 3 C. P. D. 410; 4 C. P. D. 182.

(4) 3 C. P. D. 121.

(5) 6 Q. B. D. 93.

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as owner of a ship until he had made and subscribed a declaration. Registration as owner under that Act is primâ facie evidence from which the inference may be drawn that persons in charge of the ship are employed by the registered owner: *Hibbs* v. *Ross* (1).

Bigham Q.C. and *Joseph Walton* Q.C. (*T. F. D. Miller* with them) for the respondent were not heard.

Lord Herschell L.C. (after stating the facts above set forth proceeded as follows):—

My Lords, this case in my opinion turns on the construction of the charterparty, and the question is what was the relation created by it between the parties? Was it a "demise" of the ship, or if not strictly speaking a demise was it an agreement which put the vessel altogether out of the power and control of the then owner, and vested that power and control in the charterers, so that during the time that this hiring lasted she must be regarded as the vessel of the charterers, and not as the vessel of the owner?

In order to create what has been called a demise, it is obvious that the use of the word "demise" is not necessary. When this charterparty was entered into the vessel was let by the one party, and hired by the other for a term at a lump sum, to be paid month by month during that term. The use which was to be made of the vessel during that term rested entirely with the charterers. The then owner had no voice whatever in it. The charterers might send her on such voyages as they pleased; and the only right which the owner had to object was that he had limited and restricted to a slight extent the use of the vessel by the terms of the charterparty. The master of the vessel and the crew were appointed as well as paid by the charterers. The owner had no voice in this at all. All that he had a voice in was the nomination of the chief engineer, but even that officer was to be paid by the charterers. Now how would it be possible so far (I will come to the other clauses which are relied on presently) more completely to let and hire this ship—demise it, if you will—put it out of the power and control of the owner, and put it in the power and control of the charterers than by such provisions as these? It is said that the charterers could not use the vessel for all voyages, and that there was a certain restriction placed on their right so to use her. That certainly is not conclusive against a demise, otherwise there would be no demise of half the houses in this metropolis which are subject to restrictions as to the uses to which they can be put.

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(1) Law Rep. 1 Q. B. 534.

Then it is said there are other provisions which shew that the owner was not entirely parting with his possession or control of the vessel, inasmuch as he was to insure her. The remark which I have just made applies equally to that provision. But in addition to that, he was to keep the hull and machinery in thoroughly efficient repair for the service. Would it be the less a demise of a house or of a chattel because the owner who demised it undertook to keep it in repair during the term for which it was demised?

What are the other stipulations which are relied upon? There is a provision that "the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or in otherwise complying with the same." It is said that the insertion of that clause shews that the parties contemplated that the signing of the bills of lading by the captain might impose a liability upon Furness. I think a just observation was made with regard to some of these provisions by the learned Master of the Rolls; namely, that this is a document which is not prepared specially for this purpose; a good deal of it is in print, altered in writing to suit the particular arrangement; but some of the provisions that have been left standing were undoubtedly not specifically inserted with a view to this agreement, but have been left standing it may be more or less through an oversight. I do not, of course, for a moment dispute that in reading this document you must construe together the written and the printed parts. But it is not a question what liability is imposed by the clause I have just read. It imposes no liability at all. It says the charterers shall indemnify the owners from all liability. So they undertake to do, no doubt, and effect must be given to it, if such a liability is imposed. But to infer from the presence of such a provision in the charterparty that the parties must have had it in contemplation that a liability would be imposed, inasmuch as otherwise they would not have provided for an indemnity against it, appears to me to be straining the effect of a printed provision in a document of this sort much beyond the extent to which it is legitimate to do so.

The only other provision I think on which reliance is placed is this, "that the owners shall have a lien upon all cargoes, and all sub-freights, for freight or charter-money due under this charter." It does not appear to me that there is anything in that provision, which is a provision as between charterer and shipowner, which stands in the way of the view I have suggested to your Lordships that this is a case in which by the charterparty the charterer has become, pro hâc vice and during the term of the charter, the owner of the vessel, when one is considering the rights and liabilities which arise from the acts of the master, and the crew of the vessel, who during that time are the servants of the charterer, appointed and paid by him.

It cannot be disputed as a general proposition of law, that a person who does not himself enter into a contract, can only be made liable upon the contract if it was entered into by one who was his agent or servant acting within the scope of his authority; and it is equally indisputable that a liability by reason of a wrong or a tort can only be established by proving, either that the person charged himself committed the wrong, or that it was committed by his servants or his agents acting within the scope of their authority.

In the present case the right of the plaintiffs to complain of the loss of their goods by reason of the facts alleged, may be regarded as arising as a matter of contract out of the bills of lading that were signed. Is it established that the persons who signed those bills of lading, with whom in the first instance the contract was made, the master, or Messrs. Ross and Keen the agents at the port, in making that contract were acting for the defendant Furness? It seems to me impossible to contend that these were contracts made either with the master or the agents on behalf of the defendant Furness.

Then, supposing it is regarded as an action of tort, it is not suggested that Furness himself committed the wrong complained of. Was it committed by those who were Furness's servants or agents within the rule I have stated? I imagine there can only be one answer to that question, and that is that it was not.

But then it is suggested that the liabilities which arise as between the shipper of goods and the shipowner, may be regarded as to some extent exceptional, that although, looking at the matter apart from the relationship to which I have just alluded, there might be a difficulty in establishing liability, the liability nevertheless may be made out where the relationship of shipper and shipowner is found to exist. But there may be two persons at the same time in different senses not improperly spoken of as the owner of a ship. The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee simple, may be properly spoken of, no doubt, as the owner; but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them and gives them the orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel, rest upon that person who is, for those purposes during that time, in point of law to be regarded as the owner. When that distinction is once grasped it appears to me that all the difficulties that have been raised in this case vanish. There is nothing in your Lordships' judgment, as I apprehend, which would detract in the least from the law as it has been laid down with regard to the power of a master to bind an owner, or with regard to the liabilities which rest upon an owner. The whole difficulty has arisen from failing to see that there may be a person, who, although not the absolute owner of the vessel, is, during a particular adventure, the owner for all those purposes.

Is there anything in the authorities which runs counter to the view I have just expressed? I can find nothing. Not a single authority has been cited in which the owner of a vessel has ever been held liable on a bill of lading or as for a tort in any case in which the master of the vessel, or those who were guilty of the negligence, have not been properly described as the servants of the owner. No doubt a vessel may be chartered, and the charterer may have, during its continuance, full power to deal with the vessel, to determine her voyage, and to direct the course that she shall take, where, nevertheless, the master and crew remain truly the servants of the owner. In that case I apprehend it is perfectly clear that by reason of the relationship still subsisting, the owner becomes bound by such a contract as a bill of lading, and by all the contracts which a master can ordinarily make, and which persons therefore have a right to presume he is authorized to make, binding the owner.

The law seems to me to have been so settled for a very long time. The case of *Fraser* v. *Marsh* (1), which was decided so long ago as 1811, appears to me directly to bear out this view. In that case it was sought to render the registered owner liable for stores furnished to the vessel, the fact being that by a charterparty the vessel had been let for a certain number of voyages at a certain rent to the captain, who ordered stores for her use. Lord Ellenborough said: "The Register Acts were passed *diverso intuitu*; but to say that the registered owner, who divests himself by the charterparty of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by the order of the captain during the time, would be to push the effect of those Acts much too far." There your Lordships will observe that he does not rest the decision upon any doubt as to the person registered as owner being really the owner, inasmuch as under those earlier Acts the same security was not taken as is now taken to see that this was certain to be the case; but he rests his judgment upon the fact that the registered owner has divested himself of all control and possession of the vessel in favour of another, and that that person has all the use and benefit of it; and he puts the question to be determined thus, whether the captain in this instance who ordered the stores was or was not the servant of the defendant who was sued as the owner. He makes that the test of liability, and he says that if he has so divested himself of the vessel and of its use and benefit as that it is in the possession of another, whose servant the master is, then the owner ceases to be liable in respect of stores ordered by the master.

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(1) 13 East, 238; 2 Camp. 517.

What distinction is there between the case of stores and the case of liability in respect of any other matter which the master has a right to do on behalf of his owner, whoever he may be? I am at a loss to see any ground for the distinction. There is no authority for it, and I do not see any sound basis for it. A contract of affreightment is only like any other contract; and if you seek to render liable upon it some one who was not in name a party to it, you can only do so by establishing a relationship between the party making it and the party whom you seek to make responsible, which the law recognizes as creating that responsibility. No such relationship is established under the circumstances which exist here.

In *Colvin* v. *Newberry* (1), both in the Exchequer Chamber and in your Lordships' House, the law seems to have been regarded as I have submitted it to your Lordships to be. It is quite true that in that case the shipper had notice of the charter, and therefore knew of the relation which existed between the shipowner and the charterer. But I do not gather from the judgments either in the Exchequer Chamber or in your Lordships' House that that was considered an essential part of the defendant's case. It was alluded to rather as meeting an argument which had no doubt been suggested, that the master of the vessel, who was in that case himself the person to whom the vessel had been let, might have been properly regarded by those who dealt with him as acting not merely on behalf of himself, but as acting on behalf of some owner or other, if they had not had notice that he was in fact at the time being the owner. But certainly it seems to me that it would not be correct to say that the decision in that case, either in the Exchequer Chamber or in your Lordships' House, was rested solely or mainly upon the fact that such notice existed.

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(1) 8 B. & C. 166; in Ex. Ch. 7 Bing. 190; in H. L. 1 Cl. & F. 283.

It is not necessary to refer to several cases which were cited before your Lordships. *The St. Cloud* (1), *Hayn* v. *Culliford* (2), and *Sandeman* v. *Scurr* (3) were all ordinary cases of charter-party where there was no pretence for saying that there had been any demise or anything in the nature of a demise of the vessel, but where the vessel had been chartered, the master of the vessel still remaining the servant of the owner.

I have only to notice now the argument which has been based upon the Merchant Shipping Acts. Although the Legislature has now taken greater security to see that the person registered as owner is properly registered than it had done before, all it has done is to make the register primâ facie evidence of ownership. In fact it assumes that anybody may displace altogether the statutory effect which has been given to it, by proving what the facts really are. But then Sir Walter Phillimore relies upon the subsequent legislation under which the defendant Furness is registered as managing owner. My Lords, it seems to me that in order to determine the effect of legislation one must look at the object which it had in view. I cannot think that this legislation altered in any way the liabilities or the rights of a person who was registered as the managing owner or who in fact was the managing owner, except so far as the Legislature created new liabilities. It did, no doubt, create them, because it rendered the person registered as managing owner liable to penal consequences in case of the unseaworthiness of the vessel and his inability to prove that he had taken proper precautions. That burden it imposed upon him, and it was for the purpose of effectively carrying out the protection of the lives of those who went to sea on board British vessels, that this legislation was enacted. But beyond that it seems to me that it would be improper to impose any liability which the Legislature has not by enactment clearly shewn its intention to impose. I do not see how, upon any sound or proper principle, it would be possible to do so.

For these reasons I think that the judgment of the Court below ought to be affirmed and this appeal dismissed with costs, and I so move your Lordships.

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(1) Br. & Lush. 4.

(2) 3 C. P. D. 410; 4 C. P. D. 182.

(3) Law Rep. 2 Q. B. 86.

LORD WATSON :—

My Lords, I also am of opinion that the judgment of the Appeal Court ought to be affirmed. At the time when the bills of lading were signed and also at the time when the goods of the appellants suffered damage, the ship was in the possession and under the control of the charterers, who employed their own master and crew in her navigation. That point once fixed, it appears to me that there is really no substantial question which can arise upon this appeal. We have heard a very able argument from the Bar, and a great deal of authority has been cited, upon points which I think it unnecessary to discuss at large. They have been sufficiently dealt with in the judgment which has just been delivered by the Lord Chancellor.

The master who signed the bill of lading was the servant and agent of the charterers and not the servant and agent of the respondent Furness. In that state of facts, the appellants in order to succeed here, must establish that the present case forms an exception from the general rule that a man is not liable upon contracts made by persons who are neither his agents nor his servants. They argued that the respondent remains liable for contracts made by the charterers' agent with shippers who had no notice of the terms of the charter. For that proposition no authority whatever was produced. All the decisions cited at the Bar, so far as they had any bearing upon such circumstances, appear to me to point very distinctly to the opposite conclusion. No doubt, when a shipowner who enters into a charterparty without parting with the possession and control of his ship seeks to limit the powers assigned by law to his captain, the limitation will be altogether ineffectual in any question with shippers who are ignorant of the terms of the instrument. That, however, is a question as to the limitation of the powers of an actual agent who has known powers according to law. Notice of the limitation must be given to those who deal with the agent in order to disable them from contracting with him. But I know of no principle or authority which requires that notice must be given when an owner parts, even temporarily, with the possession and control of his ship in order to prevent the servant of the charterer from pledging his credit.

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As to the Merchant Shipping Acts it appears to me that the managing owner is registered and the register carried about with the vessel for statutory purposes only. When these statutory provisions are examined it becomes abundantly clear that it was not the intention of the Legislature to effect any change in the legal relations existing at the time when the Acts passed between owners and charterers and the shippers of cargo.

Lords Morris and Field concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, 14th Nov. 1892.

Solicitors for appellants: *Stokes, Saunders, & Stokes.*
Solicitors for respondent: *William A. Crump & Son.*

[HOUSE OF LORDS.]

H. L. (E.)
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Dec. 16.

PANTLAND HICK . . . . Appellant;

AND

RAYMOND & REID . . . . Respondents.

Ship—Bill of Lading—Demurrage—Detention by Delay in Unloading Cargo—Reasonable Time for Unloading Cargo—Strike of Dock Labourers—Delay in Unloading without default in Consignee.

Where a bill of lading is silent as to the time within which the consignee is to discharge the ship's cargo his obligation is to discharge within a reasonable time. And that obligation is performed if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming that those circumstances, in so far as they involve delay, are not caused or contributed to by him.

A cargo was shipped for the port of London under bills of lading which did not specify the time within which the consignees were to take discharge of it. Upon the arrival of the ship in the dock the dock company, as agents for the consignees, began to unload the cargo. The unloading was interrupted for several days by a strike of the dock labourers which delayed the discharge far beyond the time which would otherwise have sufficed. Throughout the time during which the discharge ceased and the dock company were unable to supply labour to effect it, it was not possible for the consignees either to find any other person to provide the labour or themselves to obtain the necessary labour in any other way.

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Held, affirming the decision of the Court of Appeal ([1891] 2 Q. B. 626), that the consignees were not liable in damages to the shipowner for the delay.

APPEAL from an order of the Court of Appeal reported as *Hick* v. *Rodocanachi* (1).

In June 1889 the appellant's ship, the *Derwentdale*, was chartered by Rodocanachi & Co. to bring home a cargo of grain from a port in the Sea of Azoff. A cargo was loaded at Taganrog, the bills of lading providing that the cargo was to be delivered at the port of London and that it was to be applied for within twenty-four hours of the ship's arrival and reporting at the Custom House; otherwise the master was to be at liberty to put into lighters or land the same at the risk and expense of the owners thereof. No time was specified within which the discharge of the cargo was to be completed.

The ship arrived in the Millwall Dock on the 14th of August 1889, and the respondents as assignees of the bills of lading duly applied for the cargo. The dock company, as the respondents' agents, began to unload on the 16th, and proceeded with due despatch till the 20th, when some of the labourers struck. Shortly afterwards the strike became general and lasted until the 16th of September. After that date the unloading proceeded with due despatch and was completed on the 18th. Apart from the strike the discharge should have been completed in six days. The only part of the unloading which had to be performed by the shipowner was the trimming of the cargo, and this the ship's crew were able and willing to do notwithstanding the strike.

The appellant brought an action against Rodocanachi & Co. and also against the respondents, claiming against the former demurrage under the charterparty, and against the respondents damages for the wrongful detention of the ship for an unreasonable time. At the trial before Mathew J. and a special jury, the jury were by consent discharged, and the case left to the decision of the judge, the plaintiff's counsel making admissions which

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(1) [1891] 2 Q. B. 626.

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in the opinion of Lord Herschell L.C. amounted to this—that throughout the whole of the time during which the discharge ceased and the dock company were unable to supply labour to effect it, it was not possible for the respondents either to find any other person to provide the labour or themselves to obtain the necessary labour in any other way.

Mathew J. entered judgment for Rodocanachi & Co. on the ground that under a cesser clause in the charterparty their liability ceased on the arrival of the ship at the Millwall Dock. No question now arose on this part of the case.

As to the respondents the learned judge held that they had undertaken to discharge the ship within a reasonable time, that is to say, reasonable under ordinary circumstances, and had failed to perform that undertaking, and he therefore entered judgment against them for £694 13s., as damages for the detention. The Court of Appeal (Lindley, Fry, and Lopes LJJ) reversed the decision of Mathew J. so far as it concerned the respondents and ordered judgment to be entered for them.

Nov. 29; Dec. 1, 2. *Finlay* Q.C. and *Robson* Q.C. (*Hollams* with them) for the appellant:—

The respondents, as consignees, were under an unconditional obligation to discharge the cargo on arrival and for that purpose to provide sufficient labour and appliances: and since no time was fixed by the contract they were bound to do it within a reasonable time. The obligation to have labour ready to unload is on the same footing as the obligation to load, which is absolute. A man who undertakes to meet a boat and take a parcel out of the boat is bound to do it, and is not excused by some accident which prevents him, such as breaking his leg. The obligation to discharge within a reasonable time, no time having been specified, is implied by law. A reasonable time means a time which is reasonable under ordinary circumstances, not under actual circumstances. The respondents chose to delegate the discharge to the dock company, and they cannot excuse themselves for not proceeding with the discharge on the ground that the labourers employed by their agents were not willing to work for the wages offered. The case must turn upon what was foreseen and contemplated by the parties to the contract. A consignee who is not ready and willing to discharge continuously does not fulfil the obligation to discharge on the arrival of the vessel. If the consignee wishes to be protected from the consequences of a strike he must stipulate for it. The present case is governed by *Wright* v. *New Zealand Shipping Company* (1). There the charterers were not excused for the delay in unloading by the fact that there were not enough lighters: they were held bound to discharge the ship forthwith. Thesiger L.J. said "A reasonable time means a reasonable time under ordinary circumstances, and in the absence of some stipulation altering the implied contract between the parties the charterers would not be relieved from the consequences of fortuitous or unforeseen impediments affecting only the due performance by them of their part of the contract. This seems to be a result of the cases of *Adams* v. *Royal Mail Steam Packet Company* (2) and *Ford* v. *Cotesworth*" (3). Of those two cases the first is strongly in the appellant's favour; the charterers were held not to be excused for delay in loading by events which were beyond their control. Thesiger L.J. also pointed out that the shipowner can not in any way control the unloading and makes his arrangements for the employment of his vessel with reference to the time within which under ordinary circumstances his vessel will be discharged. What the parties contemplate when the contract is made is that the vessel will be discharged under ordinary circumstances. *Ford* v. *Cotesworth* (3) is not unfavourable to this contention: the ground of the decision was that the shipowners, not having performed their part of the contract, could not sue the charterers for not performing theirs. That case and the other cases relied on by the Court of Appeal are not really inconsistent with the appellant's contention. In *Taylor* v. *Great Northern Railway Company* (4) the defendants were excused for delay in delivering by causes beyond their control. In the present case the respondents have not shown that the cause of delay was beyond their control. *Burmester* v. *Hodgson* (5) turned upon what was the

(1) 4 Ex. D. 165.
(2) 5 C. B. (N.S.) 492.
(3) Law Rep. 4 Q. B. 127; 5 Q. B. 544.
(4) Law Rep. 1 C. P. 385.
(5) 2 Camp. 488.

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usual and customary time for discharging and did not determine the point now raised. So in *Postlethwaite* v. *Freeland* (1) the contract was to discharge, not in a reasonable time, but according to the custom of the port, a very different thing, and the decision does not touch the present point, though there are no doubt dicta in Lord Blackburn's judgment which make against the appellant. *Barker* v. *Hodgson* (2) and *Hill* v. *Idle* (3) turned on the point now in question and decided it in favour of the appellant. The decision in the present case by the Court of Appeal was considered in *Castlegate Steamship Company* v. *Dempsey* (4).

[LORD HERSCHELL L.C. referred to *Good* v. *Isaacs* (5).]

Sir *R. E. Webster* Q.C. and *Bucknill* Q.C. (*Leck* with them) for the respondents:—

The admission made by the appellant at the trial amounted to this, that the respondents could not have done anything to avert the consequences of the strike, and did all that they could reasonably have been expected to do. The cause of the delay being thus beyond their control the respondents are not responsible for it: *Fraser* v. *Telegraph Construction Company* (6), per Blackburn J., and *Hall* v. *Wright* (7). The case falls within the principle of *Taylor* v. *Great Northern Railway Company* (8); *Ford* v. *Cotesworth* (9); and *Postlethwaite* v. *Freeland* (1). Those decisions are not consistent with the proposition that a reasonable time means reasonable under ordinary circumstances: it is the actual circumstances that must determine the question of reasonableness. This is no hardship on the shipowner: he has the remedy in his own hands and can if he wishes name the number of days. In America the very point involved in this case was determined in 1862 by the New York Court of Appeals in favour of the respondents' contention: *Cross* v. *Beard* (10), where it was held that a reasonable time must be ascertained from a consideration of all the circumstances, and that a consignee is excused for delay in unloading by vis major, the vis major in that case being a storm which caused other vessels to obstruct the access to the wharf.

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(1) 4 Ex. D. 155; 5 App. Cas. 599.

(2) 3 M. & S. 267.

(3) 4 Camp. 327.

(4) [1892] 1 Q. B. 54, 854.

(5) [1892] 2 Q. B. 555.

(6) Law Rep. 7 Q. B. at p. 566.

(7) 27 L. J. (N.S.) (Q.B.) 345.

(8) Law Rep. 1 C. P. 385.

(9) Law Rep. 4 Q. B. 127; 5 Q. B. 544.

(10) 26 N. Y. Rep. (12 Smith's App.) 85.

Robson Q.C. in reply:—

If the consignee is prevented from unloading by vis major that may give him a good ground of defence. But a strike for higher wages is not vis major; it does not amount to a physical impossibility to perform the contract, nor, in a mercantile sense, to a practical impossibility. The admission made at the trial on behalf of the appellant meant only that the respondents acted reasonably up to and after the strike, the period of strike being excepted. They were not bound to employ the dock company and might have adopted other means. The onus of shewing that the nature of the strike was such that there was a physical or a practical impossibility rested on the respondents and they did not show it.

The House took time for consideration.

Dec. 16. LORD HERSCHELL L.C.:—

My Lords, this action was brought by the appellant, who is a shipowner, against the respondents, who were consignees and holders of the bills of lading of a cargo carried on board the plaintiff's steamship *Derwentdale,* to recover damages for the detention of the vessel during her discharge at the port of London. By the bills of lading the cargo was to be delivered in good order and condition "at the port of London."

On the 14th of August, 1889, the vessel arrived in the Millwall Dock and was reported to the Custom House. The discharge of the wheat, of which the cargo consisted, commenced on the 16th of August. On the 20th of August a strike of dock labourers began in the port of London, and some of the labourers engaged in the discharge of the *Derwentdale* then ceased to work. A few days after the strike became general, and no work was done in the discharge of the vessel until the 16th of September, when it was recommenced and finished on the 18th.

Evidence was given that apart from the strike the discharge of the vessel would have been completed in six days. The dock company were employed by the respondents to discharge the vessel. Only the trimming of the cargo was to be the work of the shipowner, otherwise the entire obligation to discharge the vessel rested on the consignees.

At the commencement of the trial, in the course of the discussion which took place as to whether the case should be heard with or without a jury, certain admissions were made by the learned counsel, and I think it well to state at the outset what I take to be the facts either proved or admitted.

I think it must be taken that throughout the whole of the time during which the discharge ceased, and the dock company were unable to supply labour to effect it, it was not possible for the respondents either to find any other person to provide the labour or themselves to obtain the necessary labour in any other way. If the terms of the bills of lading had required the discharge to be effected in any particular number of days, it is quite clear that the burden of the delay caused by the difficulty of obtaining labour would have fallen upon them, and it would have been no answer to a charge that thay had failed to fulfil their obligation, to say that the circumstances had rendered it impossible for them to do so.

The bills of lading in the present case contained no such stipulation, and, therefore, in accordance with ordinary and well-known principles the obligation of the respondents was that they should take discharge of the cargo within a reasonable time. The question is, has the appellant proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in determining whether more than a reasonable time was occupied.

The appellant's contention is, that inasmuch as the obligation to take discharge of the cargo, and to provide the necessary labour for that purpose, rested upon the respondents, the test is what time would have been required for the discharge of the vessel under ordinary circumstances, and that, inasmuch as they have to provide the labour, they must be responsible if the discharge is delayed beyond that period.

The respondents on the other hand contend that the question is not what time would have been necessary or what time would have been reasonable under ordinary circumstances, but what time was reasonable under existing circumstances, assuming that, in so far as the existing circumstances were extraordinary, they were not due to any act or default on the part of the respondents.

My Lords, there appears to me to be no direct authority upon the point, although there are judgments bearing on the subject to which I will presently call attention. I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances. Upon "the ordinary circumstances" say the learned counsel for the appellant. But what may without impropriety be termed the ordinary circumstances differ in particular ports at different times of the year. As regards the practicability of discharging a vessel they may differ in summer and winter. Again, weather increasing the difficulty of, though not preventing, the discharge of a vessel may continue for so long a period that it may justly be termed extraordinary. Could it be contended that in so far as it lasted beyond the ordinary period the delay caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time? It appears to me that the appellant's contention would involve constant difficulty and dispute, and that the only sound principle is that the "reasonable time" should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee. I think the balance of authority, both as regards the cases which relate to contracts by a consignee to take discharge, and those in which the question what is a reasonable time has had to be answered when analogous obligations were under consideration, is distinctly in favour of the view taken by the Court below.

In *Postlethwaite* v. *Freeland* (1) the law was stated by Lord

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(1) 5 App. Cas. 599, 608.

Selborne thus: "If, on the other hand, there is no fixed time, the law implies an agreement to discharge the cargo within a reasonable time; that is (as was said by Blackburn J. in *Ford* v. *Cotesworth* (1)) a reasonable time under the circumstances."

In the same case Lord Blackburn clearly indicated that this view of the law was, in his opinion, correct and in accordance with the current of previous authority; and he not only quoted with approval the law laid down in *Taylor* v. *Great Northern Railway Company* (2) that "a reasonable time" meant what was reasonable under the circumstances as distinguished from "the ordinary time" which it had been contended was the same thing as a reasonable time, but stated that in his opinion the law so laid down was applicable to the case then under consideration.

It is true that in the case of *Postlethwaite* v. *Freeland* (3) the point which has now to be determined did not directly arise, inasmuch as in that case the charterparty contained the stipulation that the cargo was to be discharged with all despatch according to the custom of the port, and I cannot agree with what appears to have been the view of Lord Blackburn, that this was necessarily the same as the implied obligation to discharge within a reasonable time.

In that case it was proved that the mode of discharge customary in the port was by means of a warp and lighters, and that these were under the absolute control of a company to which the government authorities had transferred all their powers, and that the company allowed vessels the use of the warp and lighters in turn. The result was that, owing to the presence of a considerable number of ships, the turn of the appellant's vessel did not come for a considerable time.

It appears to me that, under these circumstances, the judgment was inevitable, that the cargo had been discharged with all despatch according to the custom of the port, and also that *Postlethwaite* v. *Freeland* (3) cannot be taken as a decision concluding the question arising on this appeal. The dicta are undoubtedly of great weight, and I concur with the result at which Lord Blackburn arrived, that, so far as there was prior

(1) Law Rep. 4 Q. B. 127; 5 Q. B. 544.
(2) Law Rep. 1 C. P. 385.
(3) 4 Ex. D. 155; 5 App. Cas. 599.

authority, it pointed in the direction of the view adopted in the present case by the Court of Appeal. Lord Blackburn excepted the case of *Wright* v. *New Zealand Shipping Company* (1), regarding the decision there as conflicting with that of the Court of Appeal in *Postlethwaite* v. *Freeland* (2). Now it is to be observed that Thesiger L.J., who had been a party to the judgment in *Wright* v. *New Zealand Shipping Company* (1), was also a party to the decision in *Postlethwaite* v. *Freeland* (2) in the Court of Appeal. He manifestly did not intend to lay down the law differently in the two cases, nor do I think there is any necessary conflict between them, although, no doubt, expressions are to be found in the judgments in *Wright* v. *New Zealand Shipping Company* (1) which favour the contention of the appellant in the present case. Cotton L.J. in his judgment in that case in terms says, that he will not attempt to lay down an exhaustive rule, but will speak chiefly with reference to the case then before the Court. The facts there were that the cargo was to be delivered into lighters alongside, or at the wharf, as charterer's agents might direct, no time being fixed within which the discharge was to take place. At the port of discharge there were only two firms of lightermen for discharging cargoes, one of which worked solely for the defendants, the charterers, and the captain was compelled to employ this firm alone to discharge the vessel. At the time when the vessel arrived the port was unusually crowded by a "rush" of vessels, and about twenty vessels were lying there, of which one-half either belonged to or were chartered by the defendants. The number of lighters was small; and it was proved that, after the arrival of the vessel, preference in discharging cargoes was shewn to vessels with "round" charters.

The learned judge who tried the case, in summing up, told the jury that they were to take into consideration the circumstance that the port was full of vessels; but he did not directly tell them not to consider the deficiency of lighters caused by the large number of ships, so far as that state of things had been produced by the defendants themselves; nor did he tell them that the defendants were bound to provide the means of unloading

(1) 4 Ex. D. 165. (2) 4 Ex. D. 155.

within a reasonable time; nor that they were bound to allot the lighters proportionately among the vessels, or to use the lighters for them in the order in which they arrived. The jury found in favour of the defendants, and the appeal was against the judgment of the Queen's Bench Division making absolute a rule for a new trial.

It will thus be seen that the circumstances which prevented the vessel being discharged within the ordinary time were not beyond the control of the defendants. It was not shewn that they could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier, and so have avoided the delay which took place. Under these circumstances I think the decision was perfectly right and a new trial properly granted.

In my opinion the cases referred to by the appellant's counsel, in which it has been held that there was a breach of the obligation on the part of a charterer to supply a cargo, do not involve the assertion of any doctrine in conflict with that which has been laid down in the present case by the Court of Appeal.

For these reasons, my Lords, I am of opinion that the judgment of the Court below was correct, and ought to be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, although the precise question raised in this appeal is said to be submitted for the first time to the determination of an English Court, the principles which must govern its decision are as old as the law of contract.

When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.

In the face of the admission given by him at the trial, it is in vain for the appellant to suggest that the delay which occurred in unloading the *Derwentdale's* cargo was owing to causes under the respondents' control, or to their failure to do anything which could possibly or reasonably have been done, in order to avoid that delay. In that state of the law and of the facts it is, in my opinion, impossible that the appellant can prevail unless he is able to shew that the rule, as administered in the case of other contracts, is subject, when the contract is constituted by bill of lading, to the singular exception that the owner of the goods must be held to have acted unreasonably, and to be liable for the delay, whenever the operation of unloading is stopped by an unforeseen obstacle which he did nothing to create and is powerless to remove. A proposition of that character requires some authority to support it, but none has been produced.

In none of the cases cited at the bar does it appear to me that the point now raised was present to the minds of the learned judges. But it is sufficient for the purposes of this appeal that, whilst nothing was said, in any of them, which lends the least countenance to the proposition maintained by the appellant, much was said pointing in an opposite direction. These cases, in so far as they were founded on by the appellant as authorities in his favour, have been carefully examined in the opinion just delivered by my noble and learned friend, to whose reasons for affirming the judgment of the Court of Appeal I have really nothing to add.

LORD ASHBOURNE:—

My Lords, the question raised in this appeal is important, and is up to this not covered by any express authority. Having regard to the admissions of the parties, the sole question is, who is to bear the loss caused by the strike? who is to bear the risk of the strike, assuming each party to be innocent, that each party did what he could, and that the happening of the strike was entirely beyond and outside the control of either

Lord Ashbourne.

The contract not naming any time for unloading, the obligation of the defendants was to unload within the time implied by law, that is, a reasonable time. What is the meaning of this expression "reasonable time"? It is obvious that "reasonable" cannot mean a definite and fixed time. It would not be "reasonable" if it was not sufficiently elastic to allow the consideration of circumstances, which all reason would require to be taken into account. The appellant accordingly admits that the consignee has a right to have all ordinary circumstances taken into account, but insists that all extraordinary circumstances are to be excluded from consideration. Is this distinction sound, and does it rest upon any real principle? If the consignee does all he can, is not his conduct reasonable? If by circumstances absolutely outside his control he can do nothing, is his inaction unreasonable? If it is reasonable to consider some circumstances outside his control in favour of the consignee, why are not all circumstances in the events which actually happen, and which he cannot control, also to be taken into account? In considering how to ascertain "reasonable time," must not the question come in, whether the consignee in the circumstances which eventuated acted unreasonably? If throughout the consignee acted reasonably, if he did all he could, if he omitted nothing that he should have done, why should all the circumstances be arbitrarily divided into ordinary and extraordinary for the purpose of putting a narrow and artificial meaning upon the words "reasonable time"? Unless lex cogit ad impossibilia, I think when the parties have used a form of contract, which names no day, and leaves the discharge of the cargo to be made within the reasonable time implied by law, that reasonable time should be ascertained by a consideration of all circumstances which eventually happen, and which are outside the control of the consignee.

It is somewhat strange that this important question has not heretofore been clearly and finally settled by direct authority, and it is manifest from the arguments addressed to your Lordships that the decisions in somewhat similar cases are conflicting, and the opinions of eminent judges would appear not to harmonise. The particular point involved in this appeal has never, I believe, been expressly discussed or decided, although the decisions which have been referred to deal with topics and considerations most apposite to the case before your Lordships.

The case of *Ford* v. *Cotesworth* (1) is worthy of attention. The contract was silent as to time, and therefore the freighter was bound to unload within a reasonable time. Owing to threats of bombardment the cargo could not be landed in the usual time, and it was held that the charterer was not liable for the delay. Cockburn C.J. in his summing-up said "there would be a point of law whether this case was to be decided with reference to the ordinary state of things at the port, or whether any extraordinary circumstances that prevented the unloading might be taken into account."

The questions left to the jury were, whether, looking to the ordinary state of things at the port, there was any unreasonable delay; whether, looking to the extraordinary circumstances, there was any unreasonable delay; whether there was any delay caused by political circumstances over which the consignees had no control; was any delay caused by the default of the consignees; and to contingently assess the damages for the time during which the ship was kept at her berth doing nothing by the action of the government of the place and the threats of bombardment.

The jury, in answer to the first two questions, found that there had been no unreasonable delay, and they assessed the damage, if any was to be allowed. The plaintiff applied to the Queen's Bench to enter the verdict for him, and that Court held that the contract implied by law was that each party would use reasonable diligence in performing their part of the delivery, which by the custom of the port fell upon him; and that there was no implied contract that the discharge should be performed in the time usually taken at the port. Blackburn J. in pronouncing the judgment of the Court said, at p. 136: "We are aware of no authority for saying that the law implies a contract to discharge in the *usual time*, except what is said in *Burmester* v. *Hodgson* (2), in which case it was not necessary for the decision. We think that the contract which the law implies is only that the merchant and shipowner should each use reasonable despatch in performing his part. That such was the opinion of Lord Tenterden appears to be implied from his ruling in *Rogers* v. *Hunter* (1) as to what was the obligation of the holder of a bill of lading. If this be so, the delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls." The Exchequer Chamber also on appeal upheld the verdict for the defendants. Martin B. in giving judgment said: "I am not aware of any case which goes to impose by mere implication of law, without any stipulation whatever, so unreasonable a liability as that which the plaintiffs seek to impose on the defendants, that they are to be answerable for the delay caused by vis major."

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(1) Law Rep. 4 Q. B. 127; 5 Q. B. 544.

(2) 2 Camp. 488.

Ten years later, in the year 1878, came the case of *Wright* v. *New Zealand Shipping Company* (2) which has been so much relied on by the appellant. There the charterparty was silent as to time, and therefore it was implied that the ship should be unloaded within a reasonable time. Bramwell L.J. said, "a reasonable time for doing an act is a time within which it can be done by a person working reasonably," and Thesiger L.J. said, "a reasonable time means a reasonable time under ordinary circumstances." This decision is naturally relied on by the appellant, although it was not intended in that case to lay down any general rule, and the circumstances were not at all outside the control of the defendants.

The case of *Postlethwaite* v. *Freeland* (3) is most important in consequence of many of the dicta, although the precise point involved in this case did not actually arise. The Earl of Selborne, in giving judgment in the House of Lords, said: "If there is no time fixed the law implies an agreement to discharge the cargo within a reasonable time, that is, as was said by Blackburn J. in *Ford* v. *Cotesworth* (4), a reasonable time under the circumstances." Lord Blackburn's own judgment in this case is the strongest decision in favour of the contention relied on by the respondents, and presents the topics against the appel-

(1) Mood. & M. 65.
(2) 4 Ex. D. 165.
(3) 4 Ex. D. 155; 5 App. Cas. 599.
(4) Law Rep. 4 Q. B. 127; 5 Q. B. 544.

lant's contention with great force. These cases and others cited during the argument shew that there is a conflict of judicial opinion on the question involved, but, in my opinion, the preponderance of authority and reasoning is against the appellant. Besides, the authorities by way of analogy (as forcibly pointed out by Fry L.J.) are also against the appellant, and in favour of the view that reasonable time must be determined by reference to the actual events which occur. In the case of *Taylor* v. *Great Northern Railway Company* (1) it was held that a common carrier was only bound to carry within a reasonable time, looking at all the circumstances of the case. Erle C.J. says plainly, "I take reasonable time to mean a time within which a carrier can deliver, using all reasonable exertions."

The case of *Hall* v. *Wright* (2) also shews an effort to apply a liberal construction of "reasonable time" in an action of breach of promise of marriage.

And the American case of *Cross* v. *Beard* (3), decided thirty years ago, shews that a breach in a canal and a storm on a lake were taken into account in measuring what was reasonable time.

But, my Lords, it is not upon analogies or upon conflicting authorities alone that the decision of your Lordships can rest, although they are most valuable and important to elucidate the position. Principle and reason, in my opinion, alike oppose the contention of the appellant. It is somewhat hard to make either party suffer, but there is no help for it. It must be remembered that there are forms of bills of lading which expressly name strikes and such contingencies, and cast the responsibility upon the consignees. If the shipowner wishes the merchant to be answerable for such events, he can stipulate for it expressly. It is no doubt hard on the shipowner in this case, but I do not apprehend any disturbance in mercantile contracts, as parties can readily, if they please, change the terms of future contracts, and prevent the possibility of misunderstanding or surprise. On the grounds that I have referred to I think the judgment of the Court of Appeal should be affirmed.

My noble and learned friend Lord Morris, who is unavoidably

(1) Law Rep. 1 C. P. 385.

(2) 27 L. J. (N.S.) (Q.B.) 345.

(3) 26 N. Y. Rep. (12 Smith's App.) 85.

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absent to-day, has requested me to say that he concurs in the conclusion at which your Lordships have unanimously arrived.

LORD FIELD:—

My Lords, I concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 16th Dec. 1892.

Solicitors for appellant: *Downing, Holman & Co.*
Solicitors for respondent: *Lowless & Co.*

[HOUSE OF LORDS.]

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DAVID MORGAN . . . . APPELLANT;

AND

THE STEAMSHIP "CASTLEGATE" AND THE FREIGHT DUE FOR THE TRANSPORTATION OF THE CARGO LATELY LADEN ON BOARD THEREOF, AND THE CASTLEGATE STEAMSHIP COMPANY, LIMITED, THE OWNERS OF THE SAID VESSEL . . . . RESPONDENTS.

THE "CASTLEGATE."

Ship — Charterparty — Disbursements by Master on Account of the Ship — Maritime Lien on Ship and Freight—Master's Authority to Pledge Credit of Owner—Merchant Shipping Act 1889 (52 & 53 *Vict.* c. 46) s. 1.

The Merchant Shipping Act 1889 does not give the master of a ship a maritime lien on ship for disbursements for which he has no authority to pledge the shipowner's credit.

Where there is no maritime lien on ship there can be no lien on freight in respect of the same debt.

By a charterparty for the hire of a steamship it was agreed that the charterers should provide and pay for coals. In the course of a voyage it became necessary to procure coals to enable the ship to prosecute the voyage and earn freight. The master, who had notice of the terms of the charterparty, obtained the coals and drew on the charterers for the value.

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The bill having been dishonoured the master was sued on it, and then instituted a cause of disbursements in the Court of Admiralty against ship and freight:—

Held, that as the shipowner was not personally liable for the disbursements the master had no maritime lien on ship, and that although his claim for payment out of the freight was supported by considerations of equity, he had no lien on freight, since by the practice of the Admiralty Courts there cannot be a maritime lien on freight where there is no lien on ship in respect of the same debt.

The decision of the Court of Appeal in Ireland (29 L. R. Ir. 55), affirmed.

APPEAL from an order of the Court of Appeal in Ireland (1). The facts were as follows:—

By a charterparty made on the 20th of November 1889 the Castlegate Steamship Company, Limited, as the owners of the steamship *Castlegate*, agreed to let, and Douglas H. Morgan & Co. agreed to hire, the steamship *Castlegate* for six months, the charterers to pay for the use and hire of the vessel at the rate of £930 per month in cash in advance monthly. The conditions were (inter alia) that the owners should provide and pay for all the provisions and wages of the captain, officers, engineers, firemen and crew; should pay for the insurance of the vessel, also for the engine-room stores, and maintain her in a thoroughly efficient state in hull and machinery for the service. That the charterers should provide and pay for all the coals, port charges, pilotage, agencies, commissions and all other charges whatsoever except those before stated. That the whole reach, burden &c. of the ship should be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew &c. That the captain, though appointed by the owners, should be under the orders and directions of the charterers as regards employment, agency, or other arrangements. That the owners should have a lien upon all cargoes, also subfreight, for freight or charter money due under the charter, and charterers to have a lien on the ship for all the moneys paid in advance and not earned and derelicts, and salvage for owners and charterers, equal benefit to each after settling with the crew, paying hire of steamer for time lost and cost of coal consumed.

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(1) 29 L. R. Ir. 55.

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Of this charterparty the appellant, the master of the *Castlegate*, had notice. In January 1890 the vessel sailed under this charterparty with a cargo for the river Plate. At Port St. Vincent coals were necessary for the prosecution of the voyage, and were there at the master's request supplied by the firm of Wilson Sons & Co. Limited, who had contracted with Douglas H. Morgan & Co. for the supply of coals. Wilson Sons & Co. Limited also at the master's request paid for the necessary port charges. In respect of these necessaries a bill for £313 1*s.* was drawn by the master in favour of Wilson Sons & Co. Limited upon Douglas H. Morgan & Co. On the homeward voyage coals were again needed and a similar transaction took place with the same firm, in respect of which the master drew a bill for £1078 10*s.* 9*d.* on Douglas H. Morgan & Co.

In December 1889 Douglas H. Morgan & Co. made a subcharter for the homeward voyage to Samson & Co. at 22*s.* 6*d.* per ton for a cargo of wheat or maize to certain ports on the Continent or in the United Kingdom; and Samson & Co. again subchartered the vessel at 24*s.* 6*d.* per ton to Arning, Brauss & Co. Under this last charter the vessel sailed on her homeward voyage for Cork, where she arrived on the 11th of May 1890. Wilson Sons & Co. Limited then instituted a cause of necessaries in the Local Admiralty Court of the Borough of Cork against the vessel, cargo and freight. Thereupon the assignees of the bill of lading paid into Court the sum of £1392, the estimated balance of the freight after deducting the advanced freight and the cost of loading, and the owners of the vessel, to save her from arrest, paid into Court £1500. The cause, and those two sums as representing freight and ship, were afterwards transferred to the High Court of Admiralty in Ireland, where the cause was eventually dismissed. Wilson Sons & Co. Limited also sued the master and recovered judgment against him upon the two bills of exchange drawn by him, which had been dishonoured, Douglas H. Morgan & Co. having failed. The master instituted the present cause of disbursements in the High Court of Admiralty of Ireland against the ship and freight claiming a lien thereon for recovery of the amount of the two bills, £1391 11*s.* 9*d.*, as "disbursements properly made by him on account of the ship, and liabilities properly incurred by him on account of the ship," within the Merchant Shipping Act 1889 s. 1.

Judge Townsend in the High Court of Admiralty made a decree in favour of the validity of the plaintiff's claim, and declaring that in respect of the sum of £1391 11*s.* 9*d.* and costs he had a lien on the two funds in Court representing ship and freight, that in paying the plaintiff's claim the sum representing the freight should in the first instance be applied, and when that sum should be exhausted the sum representing the ship should be so applied. This decree was reversed and the plaintiff's petition dismissed by the Court of Appeal in Ireland (Lord Ashbourne L.C., Palles C.B. and Barry L.J.) (1).

By sect. 1 of the Merchant Shipping Act 1889 (52 & 53 Vict. c. 46) "Every master of a ship . . . . shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages."

Nov. 18, 21, Dec. 1. *Pyke* Q.C. and *Joseph Walton* Q.C. (*Hollams* with them) for the appellant:—

The claim for a maritime lien on ship and freight is based upon sect. 1 of the Merchant Shipping Act 1889 (52 & 53 Vict. c. 46) which was passed in consequence of the decision of this House in *The Sara* (2), which overruled a series of cases where it had been held that the Admiralty Court Act 1861 gave the master a maritime lien on ship for disbursements on account of the ship. Those were no doubt cases where the owner was personally liable for the disbursements. But the Act of 1889 does not confine the lien to cases where the owner is personally liable; it gives the master "the same rights, liens, and remedies for the recovery of disbursements properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages." "Properly incurred" is equivalent to "necessary disbursements," which these were; and they were incurred on

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(1) 29 L. R. Ir. 55.

(2) 14 App. Cas. 209.

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account of the ship. The owners had an interest in the ship being supplied with coals; unless the freight was earned they might not get the hire-money; also they would have an interest in any salvage earned. Anything that would give the owners a security for the hire-money would be a necessary. The captain was bound to follow the ordinary course of business, and in the ordinary course he drew on the charterers. "On account of the ship" does not mean "on account of the shipowner"; if that had been meant those words would have been used. The Act gives the same lien for disbursements as the master had already for his wages—that is to say a lien for service, independent of contract. If it had been intended to confine the right to a lien to cases where the owner was personally liable words to that effect would have been used, as in 7 & 8 Vict. c. 112, s. 16 which enacted that all rights, liens &c. belonging to a seaman for the recovery of his wages should in the case of the bankruptcy of the owner be extended to masters of ships "in respect to the recovery of wages due to them *from the owner of any ship*." The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) by sect. 191 extended that remedy to all cases and omitted the qualifying words "due to them from the owner of any ship." And the Admiralty Court Act 1861 (24 Vict. c. 10) by sect. 10 gave the Court of Admiralty in England jurisdiction over any claim by the master of any ship "for wages earned by him on board the ship." Sect. 33 of the Court of Admiralty (Ireland) Act 1867 (30 & 31 Vict. c. 114) contained a similar enactment with regard to Ireland. The lien for wages being thus the same whether the master was the servant of the owner or the charterer, and therefore independent of contract, the lien for disbursements must also be independent of contract, and must be equally good whether the master is the servant of the owner or the charterer. "It has been," said Dr. Lushington in *The Edwin* (1), "the immemorial custom of the Court of Admiralty to look to the service done as the ground of the claim against the ship"; and he held (in a case where the master was hired by one who had fraudulently obtained possession of the ship, so that the owner was not personally liable) that "independent of contract the master acquired a lien upon the ship" for wages and actual disbursements "by the performance of the services." So in cases of collision. "Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage, and was proceeded against in this court—I will admit for the purpose of argument that the charterers and not the owners would be responsible elsewhere, although I give no opinion upon that point—but still I should here say to the parties who had received the damage that they had by the maritime law of nations a remedy against the ship itself." This was the opinion of Dr. Lushington in *The Ticonderoga* (1), and he decided that case accordingly. That opinion was followed by Sir R. Phillimore in *The Lemington* (2), where he held that a ship chartered by her owners so that the whole control and management of ship and crew are vested in the charterers is liable in rem for damage done to another ship by the negligence of her crew, though they are the charterers' servants; and he explained the dicta to the contrary effect of Dr. Lushington in *The Druid* (3).

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(1) Br. & Lush. 281, 285.

Upon principle and authority therefore the lien on ship is established, and the adverse decisions in *The Beeswing* (4) (where *The Fairport* (5) was not cited), in *The Turgot* (6) (where it seems to have been assumed by Sir J. Hannen that the personal liability of the owner was necessary to give a lien on ship, and where the Admiralty Court Act 1861 was not even mentioned), and in *The Durham City* (7), were wrong and should be overruled. Whatever the terms of the charterparty may be as to the provision of and payment for coals the master in the present case was the servant of the owners and might incur personal liability in carrying out their instructions, and is entitled to be indemnified by them, although the coals were not supplied on his credit. It will be a great hardship on captains (who may not know of any

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(1) Swa. 215, 217.

(2) 32 L. T. (N.S.) 69; 2 Asp. M. C. (N.S.) 475.

(3) 1 W. Rob. 391, 399.

(4) 5 Asp. M. C. 484; 53 L. T. (N.S.) 554.

(5) 8 P. D. 48.

(6) 11 P. D. 21.

(7) 14 P. D. 85.

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charterparty) if they are to be deprived of their lien on ship for disbursements and liabilities properly made and incurred.

But even if there be no lien on ship the master has a lien on freight. But for these disbursements the freight would not have been earned: they were disbursements "on account of the ship" as against the charterers who were so far as the freight was concerned owners. The master has therefore in equity a manifest right to a lien on freight: *Bristow* v. *Whitmore* (1); *The Feronia* (2). The argument against the lien on ship is based on the ground that the master was not the agent of the owners to pledge their credit for the coals, but was the agent of the charterers. It cannot be now said in order to defeat his lien on freight that he was not the agent of the charterers. And if the personal liability of the owners for the disbursements be the basis of the right to a lien, that basis exists; the charterers who were the owners of the freight were liable for the coals.

Sir *Walter Phillimore*, and *Aspinall* Q.C. (*Satow* with them) for the respondents were directed to confine their arguments to the claim of a lien on freight:—

Assuming that there is no lien on ship there can be none on freight, for the lien on freight springs out of the lien on ship, and there is no case where freight has been attached unless the ship also has been attached. Without the right to arrest the ship no right to arrest the freight exists: *Smith* v. *Plummer*, per Lord Ellenborough (3); and see *The Ringdove* (4); *The Jonathan Goodhue* (5); *The Edward Oliver* (6); *The Orpheus* (7); *The Dowthorpe* (8). The words "on account of the ship" have always been interpreted "on account of the shipowner," and these disbursements being on account of the charterers are therefore not "disbursements properly made on account of the ship" within the meaning of the Merchant Shipping Act: *The Tasmania* (9); *The Beeswing* (10).

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(1) 9 H. L. C. 391; 31 L. J. Ch. (N.S.) 467.

(2) Law Rep. 2 A. & E. 65, 75.

(3) 1 B. & Ald. 575, 582.

(4) Swa. 310.

(5) Swa. 524.

(6) Law Rep. 1 A. & E. 379.

(7) Law Rep. 3 A. & E. 308.

(8) 2 W. Rob. 73, 81.

(9) 13 P. D. 110.

(10) 5 Asp. M. C. 484; 53 L. T. (N S.) 554.

Pyke Q.C. in reply cited *The Andalina* (1).

The House took time for consideration.

Dec. 16. LORD HERSCHELL L.C. [after stating the facts above set forth, proceeded as follows:—]

My Lords, the claim of the plaintiff to a maritime lien was rested upon the 1st section of the Merchant Shipping Act 1889, and his case was that these were disbursements and liabilities properly incurred by him on account of the ship, inasmuch as they were incurred for the purpose of procuring coals which were necessary to enable the vessel to prosecute her voyage as a steamer in the adventure in which she was engaged.

There can be no doubt that in a sense this expense may be said to have been incurred "on account of the ship" if you regard those words as including all disbursements which are necessary or desirable for the purpose of enabling the ship to be effectively used. But it is, in my judgment, impossible to treat the question of the construction of this section as if it had to be entered upon without any regard to previous legislation or decisions. The words to which I have called your Lordships' attention were not new words; they had been used in legislation relating to the jurisdiction of the Admiralty Court and had received judicial construction. In the 10th section of the Admiralty Court Act 1861 and the 33rd section of the Admiralty Court (Ireland) Act 1867, it had been provided that "the Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship."

In the *Mary Ann* (2) those words were held to give the master of the ship a maritime lien for disbursements made by him on account of the ship; and that decision remained unquestioned in this House, was treated as law, and had effect given to it for a considerable number of years. In the *Sara* (3) which came to

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(1) 12 P. D. 1. (2) Law Rep. 1 A. & E. 8. (3) 14 App. Cas. 209.

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your Lordships' House, it was held that the decisions to which I have referred were erroneous, inasmuch as the Admiralty Court Act in England, to which I have alluded (and of course the decision applied equally to the Admiralty Court Act in Ireland) did not create any maritime lien which had not existed before, but merely conferred jurisdiction upon the Court of Admiralty in cases in which it did not possess jurisdiction before.

Immediately after the decision that the maritime lien which it was supposed had been created by the Act of 1861 did not exist, the statute upon which the appellant relies was passed. There can be no doubt that it was passed for the purpose of creating the lien which it had been supposed existed by virtue of the section which gave jurisdiction to the Court of Admiralty. Whilst that lien was supposed to exist, the question arose in the courts within what limits the right was to be confined upon the true construction of the words to which I have called your Lordships' attention, "disbursements made by the master on account of the ship." In *The Turgot* (1) the question arose under circumstances almost precisely similar to those which have given rise to the present controversy. In that case the vessel was under charter. The charterers were bound (as in the present case) to provide, amongst other things, coals. The master had put his name to a draft in respect of the coals which had been provided, and he sought to enforce a maritime lien, in respect of that liability, against the ship and freight. The then President of the Probate and Admiralty Division held that he was not entitled to do so. Reliance was of course placed upon the very same words which are relied upon here. This liability, it was said, arises in respect of, and may therefore be regarded as, a disbursement in respect of goods supplied on account of the ship. The learned President, after calling attention to the fact that "by the charterparty" while "the owners were to provide and pay for provisions and wages," "the charterer was to provide and pay for coals," and "the captain was to be appointed by and to follow the instructions of the charterer," said, "After the coals and provisions were supplied, the captain proposed to pay for them by drawing on the charterer," but believing, from a statement made to him, that there were instructions from the owners to draw on them, "the captain did draw on the owners for the coals and provisions." The learned President then proceeded: "I am of opinion that the captain is not entitled to recover in respect of the coals, as by the terms of the charterparty he had no authority to pledge the owners' credit in respect of them. It was argued that the master had an implied authority to pledge the owners' credit as their agent *ex necessitate* in order to enable the ship to sail." "But the authority of the master depends on the facts; and as the charterers were bound to pay for the hire of the vessel during its detention, the owners had no interest in obtaining its immediate departure." And he accordingly held that the plaintiff, whilst entitled to recover for the disbursements which he had made in so far as they were disbursements which the owners under the charterparty were liable to pay, had no right against the ship or freight in respect of the disbursements which he had made for the supply of coals, which the charterers were bound to provide and pay for. It was therefore a distinct decision that disbursements made by the master on account of the ship must be limited to disbursements which he had a right to make on the credit of the owners of the ship, and did not extend to disbursements made by him for purposes for which the charterers ought to have made provision, even though in a sense they might be said to have been made on account of the ship.

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(1) 11 P. D. 21.

That decision did not stand alone. The same conclusion was arrived at in other cases; and it seems to me that it would be contrary to all sound principle not to bear those facts in mind when construing the statute which was passed after the decision in *The Sara* (1). In relation to this very matter there had been what may without impropriety be called a course of decision in the Court of Admiralty, putting a construction upon those words "disbursements on account of the ship."

When the Legislature altered the law laid down in this House in the case of *The Sara* (1), and restored the law which was supposed to exist before, it cannot for a moment be imagined that the Legislature was ignorant of the construction which had

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(1) 14 App. Cas. 209.

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been consistently put upon the words in the former Admiralty Court Act, which was supposed to create a lien. I cannot conceive that if it had been intended to create a wider lien than had been held to exist under the previous words which were supposed to create it, the Legislature would not have used different words to those upon which this construction had been put, so as to make that intention clear and unambiguous. For these reasons I entertain a clear opinion that the judgment of the Court below in respect of the alleged maritime lien on the ship must be affirmed.

But it is said on behalf of the appellant, and I own with very considerable force, that if it be true that inasmuch as there was no power to pledge the owner's credit there ought not to be and cannot be a maritime lien upon this vessel, which is the property of the owners, yet as regards the freight, which was the charterers', inasmuch as there was authority to pledge the credit of the charterers for these coals, a maritime lien ought to be enforced against the freight. As a matter of equity no doubt there is much to be said for that contention; and certainly, speaking for myself, if I could have seen my way to do so, I should have given effect to the contention of the appellant. But there appear to me to be insuperable difficulties to taking such a course as that. In the first place, one would have to say that whilst these disbursements when regarded as affecting the owners of the ship were not "disbursements on account of the ship," the very same disbursements when you were looking at the case as affecting the charterers were "disbursements on account of the ship," because those are the words and the only words which could give the right insisted upon under the statute. That appears to me of itself to be a very great difficulty. But besides that, no authority has been cited in which the Court of Admiralty has ever granted process against freight for the purpose of enforcing a maritime lien upon it except as consequential upon and in connection with process against the ship. No case was cited to us in which the one had not been connected with the other, or in which, where there was no power to arrest the ship because there was no maritime lien enforceable against the shipowner, there had nevertheless been held to be a power to arrest the freight, or that from which the freight arose, for the purpose of enforcing a lien against the freight.

Under these circumstances, having regard to the difficulties which arise upon the construction of the Act of Parliament, which alone gives any such maritime lien, and to the practice of the Court of Admiralty with respect to lien upon ship and freight, I do not see my way to giving, even in respect of the freight, though I should be fully inclined to do so if I could, the relief to the plaintiff which he seeks in this action.

For these reasons I am of opinion that the decision appealed from must be affirmed, and the appeal dismissed with costs.

My noble and learned friends, Lord Halsbury and Lord Morris, who are unable to be present to-day, have asked me to state that they concur in the opinion which I have expressed to your Lordships.

LORD WATSON:—

My Lords, the appellant was master of the steamship *Castlegate* during the six months following the 14th of December 1889, whilst she was chartered to Douglas H. Morgan & Co. at the rate of £930 per month. He, as well as the officers, engineers, firemen, and crew were employed by the respondents, the owners of the vessel, who were bound, by the terms of the charterparty, to provide and pay for their wages, for insurance on ship and engine-room stores, and to maintain the ship and machinery in an efficient state. The charterers undertook to pay port dues and various other charges, and "to provide and pay for all her coals."

Whilst the owners continued, through the appellant, to retain possession of the ship, they parted with all control over her movements, which were placed under the direction of the charterers. The lump sums stipulated for her hire were not dependent upon the freights which she might earn; and the charterers might have kept the vessel unemployed during the whole period covered by the charterparty if they had chosen to do so. In these circumstances, the legal relation of the appellant to the owners and charterers respectively does not appear to me to admit of dispute. He was the agent of the owners in procuring

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necessaries which they were bound to supply, and the agent of the charterers only in providing coals or other necessaries for which they were responsible.

The charterers employed the *Castlegate* to carry a cargo, on their own account, from Antwerp to Buenos Ayres. They then sub-chartered to Samson & Co., at 22*s.* 6*d.* per ton for a cargo of wheat or maize, to be carried from a port in the river Parana to certain ports on the Continent or in the United Kingdom. Samson & Co., by another sub-contract, parted with their right at an increased freight of 24*s.* 6*d.* per ton, to Arning, Brauss & Co., who directed the vessel to proceed to Cork Harbour, where she arrived on the 11th of May 1890. Neither of these sub-charters affected the obligation of Douglas H. Morgan & Co. to provide coals for the use of the ship.

On the outward voyage, the appellant obtained, as agent for the charterers, cash advances and coals from the firm of Wilson, Sons & Co. Limited, to the amount of £313 1*s.*; and, on the homeward voyage, he obtained from the same firm similar advances, and a further supply of coal to the amount of £1078 10*s.* 9*d.* For these sums he drew bills upon Douglas H. Morgan & Co., the first of which was dishonoured at maturity, and the second was not accepted. Wilson, Sons & Co. Limited, on the 19th of January 1891, recovered judgment against the appellant as drawer for the amount of these bills, with interest.

On the arrival of the *Castlegate* at Cork, both ship and cargo were attached, at the instance of Wilson, Sons & Co. Limited, under warrant of the local Court of Admiralty. The attachment was released upon payment into Court of £1500, as representing ship, and £1392, as representing freight. The proceedings and the moneys paid into Court were thereafter transferred to the High Court of Admiralty of Ireland, whereupon the appellant applied to that Court for a declaration that he had a valid lien for his disbursements upon ship and freight, and for payment of these disbursements out of the funds brought into Court.

The learned judge of the High Court of Admiralty affirmed both liens claimed, and directed that the appellant's disbursements should be paid in the first instance out of freight money; the balance, if any, to be paid out of money representing ship.

By the order appealed from that decision was reversed, and the present appellant's application dismissed with costs.

It was conceded in argument that the master of a ship has no maritime lien for necessary disbursements on account of ship except in those cases where it is given him by sect. 1 of the Merchant Shipping Act 1889. The difficulty of applying the provisions of the Act of 1889 to the present case arises from the fact that the respondents, who are under no liability to pay for the appellant's disbursements, are owners of the ship, and that the charterers, who are clearly responsible for them, are the owners of the freight.

As regards the appellant's alleged lien upon ship, I have had no difficulty in coming to the same conclusion with the Court of Appeal. It had been held by Dr. Lushington, in the *Mary Ann* (1), that the Admiralty Court Act 1861 gave the master a lien on ship for necessary disbursements; and that decision was followed, though not always approved of, by the Admiralty Court in a series of cases ending with *The Sara* (2), in which the judgment of Butt J. was affirmed by the Court of Appeal (2). These cases established the principle that there could be no lien upon ship in respect of disbursements for which the master had not authority to bind the owner, or, in other words, that no maritime lien could attach to the res for any sum which was not a personal debt of its owner. On appeal (3), your Lordships held that the rule which had been accepted by the Courts below in the case of *The Sara* (2) was not warranted by the Act of 1861; and it is matter of common knowledge that the object of the Legislature in passing the Act of 1889 was to give shipmasters a statutory lien for disbursements in place of the right which had been erroneously accorded to them in the Admiralty Court. Whether, as the appellant maintains, it was the intention of the Legislature to establish a wider lien than that which had been given effect to in *The Mary Ann* (1) and subsequent decisions, depends upon the language of the Act.

The clause upon which the appellant relies provides that every master of a ship shall, "so far as the case permits," have

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(1) Law Rep. 1 A. & E. 8.

(2) 12 P. D. 158.

(3) 14 App. Cas. 209.

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the same rights, liens, and remedies for recovery of "disbursements properly made by him on account of the ship," as a master of a ship has for recovery of his wages. In the case of lien for wages of master and crew the Legislature has recognised the rule that it attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship. But that rule, which is founded upon obvious considerations of public policy, constitutes an exception from the general principle of the maritime law, which I understand to be that, inasmuch as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability. It was argued that the case of lien for damages by collision furnishes another exception to the general rule, and there are decisions and dicta which point in that direction; but these authorities are hardly reconcileable with the judgment of Dr. Lushington in *The Druid* (1), or with the law laid down by the Appeal Court in *The Parlement Belge* (2), where the present Master of the Rolls, with the assent of James and Baggallay L.JJ., stated (3): "In a claim made in respect of a collision the property is not treated as the delinquent per se. Though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. That is conclusive to shew that the liability to compensate must be fixed, not merely on the property, but also on the owner through the property."

The clause in question does not expressly, neither, in my opinion, does it by implication, enact that the master shall have a lien on ship independently of the owner's personal liability. The qualifying words, "so far as the case permits," seem to indicate that in the view of the Legislature there might be cases in which master's disbursements, even if properly incurred, in a question with some one or other, would not carry a statutory lien. Then the condition upon which a lien is given to the master is, that the disbursements shall have been "properly incurred by him on account of the ship." The statute does not prescribe what disbursements shall be regarded as properly incurred on account of ship; it leaves that matter to be determined according to the existing law. Whether that reference relates to the general principles of the law maritime, or to the law as laid down by Lord Hannen in *The Turgot* (1)—one of the cases which, in so far as it concerned the existence of a lien, was overruled by your Lordships in *The Sara* (2)—is immaterial to the result of this case; because, in either view, no liability capable of carrying a lien on ship can be properly incurred by a master on account of ship in the absence of express or implied authority from the owner.

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(1) 1 W. Rob. 391.
(2) 5 P. D. 197.
(3) 5 P. D. 218.

I am, therefore, of opinion that the Act of 1889 does not empower the appellant to fix upon the respondents' ship a liability which he had not their authority to incur, and which was not necessary for the protection of their interests. He had implied authority from the charterers, because the disbursements were necessary in order to enable the vessel to prosecute her adventure, which was theirs; but he was at liberty to choose whether he would or would not pledge his personal credit for their debt. It was argued that the Legislature must presumably have meant to enforce the same policy in the case of disbursements as in the case of wages. It appears to me that any such presumption is excluded by the terms of the statute; and I can find no reasons, either of equity or of policy, for enabling the master of a vessel, who is not bound to incur a liability, to relieve himself, when he does choose to incur it, out of the property of his owners, although they may derive no benefit from it, and by the terms of his employment he is debarred from incurring it on their personal account.

The question whether the appellant has a statutory lien upon the freight brought into Court is attended with more difficulty. If the respondents, instead of chartering, had themselves navigated the *Castlegate*, these disbursements, although made for the purpose of enabling her to earn freight, would have been properly incurred on account of ship, within the meaning of the

(1) 11 P. D. 21.

(2) 14 App. Cas. 209.

Act, and the appellant would have had a statutory lien both upon ship and freight. Under the charterparty the interest which they previously had was divided, the respondents remaining owners of ship, whilst the charterers became the owners of any freight which she might earn. The appellant argued, with much plausibility, that although the effect of that arrangement might be that he ceased to have a statutory lien on ship for disbursements which were not made in the respondents' interest, the charterers became quoad freight the owners of the vessel, and consequently that disbursements properly made in their interest were incurred "on account of ship" within the meaning of the Act, and must therefore carry a statutory lien upon freight.

If the Court of Admiralty were a Court exercising equitable jurisdiction, in the sense of English law, the appellant would have a very strong equity to a lien upon the freight of the *Castlegate.* His disbursements were made in the interests of the charterers, and with their authority; and, but for these disbursements, the freight now in Court would never have been earned. However cogent these considerations may be from an equitable point of view, it does not necessarily follow that the appellant is entitled to a maritime lien.

The difficulty which the appellant has to encounter, in this branch of his claim, is to be found in the fact that the Admiralty Court has never recognised the possibility of there being a proper maritime lien upon freight which is not associated with or founded upon a right to proceed in rem against the ship. No process having for its sole object the attachment of cargo in order to enforce a maritime lien for freight can issue from that Court. The warrant to arrest cargo must apparently be accompanied by a warrant to arrest the corpus of the ship; an attachment of the ship being an essential preliminary to the Courts exercising jurisdiction to enforce a proper lien on freight. These circumstances appear to me to necessitate the inference that no claim which cannot be enforced either against the ship or her owners can, according to the practice of the Courts of Admiralty, be attended with a maritime lien upon freight.

The absolute dependence of a lien on freight upon the liability of the ship to attachment for the same debt appears to me to have been recognised by the Court of Queen's Bench in *Smith* v. *Plummer* (1), where the captain of a vessel claimed a lien for wages upon freight. There being no lien upon ship, the claim was rejected for the reasons thus stated by Lord Ellenborough C.J.: "Then if he has no lien on the ship, as appears from these cases he can have none upon the freight, as the lien on the freight is consequential to the lien upon the ship."

I am, for these reasons, of opinion that the circumstances of this case do not permit of the appellant having a lien upon freight, and that the decision of the Court of Appeal on this point also must be affirmed. I have come to that conclusion with reluctance, because I feel that the appellant's claim for payment out of freight is supported by plain considerations of equity. But it rests with the Legislature to provide a remedy should they deem it necessary, and not with the Court, whose duty it is to administer the Act as it stands.

LORD FIELD:—

My Lords, I concur in the motion which has been made. With regard to the alleged lien upon the ship I have nothing to add; but with regard to that claimed upon freight I agree that the question is not so free from doubt. If the principle that the "res," whether ship or freight, is only available for the master's lien in cases in which he has incurred the liability in respect of which the lien is claimed with the authority of the owner of the "res," is adopted, it should seem that inasmuch as, first, the freight now sought to be attached was earned for the charterers under their sub-charter, and was, in the first instance, payable to them, and, secondly, the liability incurred for the coals was incurred with their authority, the two necessary elements to the existence of the maritime lien here claimed do concur. Moreover, without the coals the ship could not have earned the freight now sought to be attached; and "service done" is of the very essence of maritime lien. On the other hand, the freight could not have been earned without the ship and her wages and necessary expenses, which were to be contributed by the

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(1) 1 B. & Ald. 575, 582.

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respondents; and the master incurred the liability in question with full notice of the conditions of the charter. There seem to me to be equitable considerations on both sides, and I gladly take refuge in the conclusion arrived at by Lord Ellenborough in *Smith* v. *Plummer* (1) that the freight is an incident of the ship, and cannot be got at unless the ship can also be attached.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 16th December 1892.

Solicitors for appellant: *Ingledew, Ince & Colt.*

Solicitors for respondents: *Maples, Teesdale & Co., for Leitch, Dodd, Bramwell & Bell, Newcastle-on-Tyne.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1892
Nov. 21.

GILROY, SONS, & CO. . . . . . . APPELLANTS;

AND

W. R. PRICE & CO. . . . . RESPONDENTS.

Ship—Bill of Lading—Exemption of Liability for Default of Master and Crew in the Navigation of the Ship—Pipe left uncased—Damage to Cargo—Seaworthiness—Judicature (*Scotland*) *Act*, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40—*Ambiguous finding—Remit.*

A cargo of jute was shipped under a bill of lading, which contained an exception from liability for any act, neglect, or default whatsoever of the master and crew in the navigation of the ship in the ordinary course of the voyage. The ship during her voyage encountered stormy weather, and the pipe of the port water-closet was broken by the pressure of the cargo, whereby water entered the vessel, and the jute was damaged.

In an action at the instance of the indorsees of the bill of lading, it was found as a fact (1.) "That the pipe was uncased at the sailing of the vessel," and (2.) "That the default came within the exemption." It was found also that (1.) it was the usual practice to case such a pipe before loading a cargo of jute; (2.) that when the cargo was loaded, the pipe was not visible; and (3.) that to case the pipe it would have been necessary to remove part of the cargo, but the evidence did not shew how much:—

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(1) 1 B. & Ald. 575, 582.

Held, reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 569), that the findings of fact amounted to a verdict that the ship was not seaworthy on sailing, and, therefore, following *Steel and Craig* v. *The State Line Steamship Co.* (3 App. Cas. 72), the exception in the bill of lading did not relieve the shipowners from liability.

APPEAL against a judgment of the Second Division of the Court of Session, Scotland (1).

Gilroy, Sons & Co., the appellants, were the onerous holders of a bill of lading for a cargo of jute, which was shipped on the *Tilkhurst*, at Chittagong, for carriage to Dundee. W. R. Price & Co., the respondents, were the owners of the *Tilkhurst*.

During the voyage the water-closet pipe on the port side of the *Tilkhurst* was broken, and sea-water was admitted into the vessel, and the cargo of jute was considerably damaged. To recover the damage so suffered, the appellants raised this action in the Sheriff Court of Lanarkshire.

The bill of lading contained this exception: "Any act, neglect, or default whatsoever of pilots, master or crew, in the navigation of the ship in the ordinary course of the voyage, and all and every dangers and accidents of the seas and rivers, and of the navigation of whatever nature and kind excepted."

The appellants averred (condescendence 6) that the ship was not seaworthy when she sailed, because the pipe in question had no casing such as is usually put round such a pipe, and is necessary for its protection; and that the damage would not have occurred if the casing had been there.

The respondents in their answer 3, quoted the exception. In answer 5, they averred that the ship encountered a severe gale, with a heavy sea, in which she sustained much damage; and that it was discovered that during the gale the force of the sea and the working, straining, and labouring of the ship, or one or other of these causes, had broken the iron portion of the port water-closet discharge pipe at the flange. In answer 6, they denied the allegation of unseaworthiness, and explained that the pipe was in perfect order when the vessel left Chittagong.

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(1) 18 Court Sess. Cas. 4th Series (Rettie), 569.

The sheriff substitute (Guthrie), on the 18th of July, 1890, found the respondents liable in damages, and on the 22nd of October, 1890, gave judgment against them for the agreed upon amount of the damage, £3407 odd.

On the 27th of February, 1891, the second division of the Court of Session recalled the interlocutor of the sheriff substitute, finding in law that the respondents were not liable for the damage, it being damage for which they were exempt from liability by the terms of the bill of lading (1).

This interlocutor contained the following findings in fact to which the appellants did not object:—

(3.) That the pipe was broken by pressure of the cargo thereon:

(4.) That the pipe was not cased as it should have been to prevent the pressure of the cargo on said pipe:

(5.) That the want of casing as aforesaid led to the breaking of the pipe and consequent damage of the cargo.

Findings the appellants complain of:—

(1.) That the pipe was broken in the course of the voyage:

(2.) That the failure to case said pipe was a default or neglect on the part of the master or crew of said ship in the navigation of the ship committed by them in the ordinary course of said voyage (2). Lord Trayner delivered the judgment of the Court.

When the appeal first came on to be heard on the 17th of March, 1892, doubts being suggested as to the meaning of finding 4 (given above as Nos. 4 and 5), the cause was remitted to the Court of Session, on the 29th of March, 1892, with directions that their Lordships should, so far as the evidence already taken enable them to do so, return answers to certain questions (3) of fact.

And by interlocutor dated the 31st of May, 1892, the following further findings were returned to this House:—

(1.) That in the case of vessels carrying jute it is according to usual practice that a pipe, such as that in question, is cased before the cargo is loaded and the ship starts on her voyage.

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(1) 18 Court Sess. Cas. 4th Series (Rettie), 569.

(2) Numbered as in printed case; for numbers in interlocutor appealed from, read (3) as (3), and (4) and (5) as part of (4), and (1) as (2), and (2) as (5). And see 18 Court Sess. Cas. 4th Series (Rettie), at p. 575.

(3) The questions put can be gathered from the interlocutor of May 31, 1892.

(2.) That after the *Tilkhurst* was loaded, the pipe in question was not visible or accessible without the removal of part of the cargo.

(3.) That in order to get at the pipe for the purpose of casing it, it would have been necessary to remove part of the cargo (which was in bales and could have been removed), but that the evidence in the cause does not shew what amount of the cargo required to be removed for that purpose.

At the first hearing,

1892. March 17. *The Solicitor-General for Scotland* (*A. Graham Murray,* Q.C. (with him *Gorell Barnes,* Q.C.), for the appellants:—

There is no doubt that this being a case from the Sheriff Court, on a proof reviewed by the Court of Session, the interlocutor appealed from, so far as it relates to what are unambiguous findings of fact, is made conclusive by the Judicature (Scotland) Act, 1825 (6 Geo. 4, c. 120), s. 40 (1); but the finding that the failure to case the pipe was a fault on the part of the master in the navigation of the ship is a finding upon a question of law depending on the construction of the exemption clause. The respondents did not aver there was any neglect on the part of the master and crew; therefore the Court of Session, in deciding that neglect to case the pipe was covered by the exemption clause, practically decided against the appellants on a fact not relied upon in the pleadings. The question distinctly raised upon the record—which, with the judgment, may be examined—was the question of seaworthiness (condescendence 6). The bill of lading is a document referring to the future, and is subject to an implied condition that the ship at starting is seaworthy. Lord Trayner held that the omission to case the pipe while the ship lay in the harbour of Chittagong was negligence on the part of the master. This was without doubt a finding that the vessel was then unseaworthy. *Steel and Craig* v. *State Line Steamship*

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(1) See *Mackay* v. *Dick*, 6 App. Cas. 251.

Co. (1) had the same clause of exemption, and yet it had still to be found whether leaving a port-hole insufficiently fastened on sailing rendered the ship unseaworthy. The cases of *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* 1887 (2) and *Good* v. *London Steamship Owners' Mutual Protecting Association*, 1871 (3) cited by Lord Trayner, arose under a different class of contract.

[Lord Halsbury, L.C.:—The findings here are not satisfactory—there is no distinct finding whether it is usual to case this pipe before loading, or whether it could be got at after the cargo was loaded. Either there must be a remit, or the parties must agree to the House taking the facts as found in Lord Trayner's judgment.]

The appellants are quite willing to agree to the latter alternative. In *Caird* v. *Sime*, 1887 (4), the parties agreed that the case should be treated as if the interlocutor had contained the necessary finding.

[He also cited *Mackay* v. *Dick* (5).]

Dean of Faculty (*J. B. Balfour*, Q.C.) (with him, *Henry Aitken*, of the Scotch Bar), for the respondents:—

As the findings stand, there are sufficient materials to decide the case. There was a proof, and the question of seaworthiness must have been considered by Lord Trayner.

On the return of the appeal with the interlocutor of the 31st of May, 1892—

1892. Nov. 21. *A. Graham Murray*, Q.C. (of the Scotch Bar) (with him, *Walton*, Q.C.), for the appellants:—

An exception in a bill of lading does not relieve the shipowner from the liability to provide a seaworthy ship. It must now be taken (interlocutor 31 May, 1892) that it is usual to case such a pipe as the one in question before putting in the cargo; and the respondents having failed now to shew that this precaution was taken, it must be held as against them that the ship was unseaworthy at the commencement of the voyage. *Steel and Craig* v. *State Line Steamship Company* (1) applies. [Stopped.]

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(1) 3 App. Cas. 72, at p. 91; 4 Court Sess. Cas. 4th Series (Rettie), 657; remitted for N. T. 4 Court Sess. Cas. 4th Series (Rettie), (H.L.), 103.

(2) 19 Q. B. D. 242.

(3) Law Rep. 6 C. P. 563.

(4) 12 App. Cas. 326, at p. 343; 13 Court Sess. Cas. 4th Series (Rettie), 23; 14 Court Sess. Cas. 4th Series (Rettie), (H.L.), 37.

(5) 6 App. Cas. 251; 7 Court Sess. Cas. 4th Series (Rettie), 778; 8 Court Sess. Cas. 4th Series (Rettie), (H.L.), 37.

Bigham, Q.C., and *Henry Aitken* (of the Scotch Bar), for the respondents:—

Whether a ship is seaworthy or not is a question of fact for the jury; and there is no distinct finding of unseaworthiness here. It cannot be assumed that a vessel is unseaworthy because some few trifling precautions are omitted before she starts on her voyage. It is always a question of fact whether such matters may be attended to during the voyage. If they can, allowing them to wait does not render the ship unseaworthy: see Lord Blackburn in *Steel and Craig* v. *State Line Steamship Company* (1). The judgment appealed from held that the casing of the pipe was a matter which might have been attended to after the sailing; therefore the ship was not unseaworthy, and the exemption clause applied.

LORD HERSCHELL, L.C.:—

My Lords, the pursuers in this action are the owners, or part owners, of a cargo of jute carried on board the ship *Tilkhurst*, and they seek to recover against the owners of that vessel, who are the defenders, by reason of the damage to a part of the cargo owing to sea-water entering the vessel and coming in contact with the jute.

The jute was shipped under bills of lading which contained this exception: "Any act, neglect, or default whatsoever of pilots, master, or crew, in the navigation of the ship, in the ordinary course of the voyage, and all and every the dangers and accidents of the seas and rivers, and of navigation of whatever nature or kind excepted."

My Lords, the effect of an exception of that kind in a bill of lading came under the consideration of your Lordships' House

(1) 3 App. Cas. 72; 4 Court Sess. Cas. 4th Series (Rettie), 657; remitted for N. T. 4 Court Sess. Cas. 4th Series (Rettie), (H.L), 103.

in the case of *Steel and Craig* v. *State Line Steamship Company* (1), and your Lordships were of opinion that under such a contract there was an implied undertaking by the shipowner that the ship was, at the time of its departure, reasonably fit for accomplishing the service which the shipowner engaged to perform, and that if the ship was not so reasonably fit the exception which I have just read in the bill of lading was no defence of the shipowner.

Now, my Lords, in the present case the House has to deal with special findings of fact, and, no doubt, cannot enter upon the question whether, so far as the facts were found, they were rightly found or not. The facts found in the interlocutor are: "That the said cargo was damaged in the course of said voyage by sea-water, which obtained access to said cargo by means of a hole in the side of the ship, to which was attached or connected the discharge pipe of the forward water-closet on the port side." We have, therefore, the cargo damaged by sea-water coming into the ship through a hole in the pipe which permitted its access; and "that said pipe was broken" (that is the next finding) "by pressure of the cargo thereon." It was therefore a pipe with which the cargo was in contact, and which was not of sufficient strength to resist the pressure of the cargo; so that if the pressure of the cargo came, owing to the ordinary movements of the ship in the sea during the voyage, to bear upon the pipe, it was unable to withstand that pressure, and would necessarily break, and the water would come in. The interlocutor further finds: "That said pipe was not cased as it should have been to prevent the pressure of cargo on said pipe. That the want of casing as aforesaid led to the breaking of said pipe and consequent damage of the cargo."

My Lords, when the case first came before your Lordships' House, doubts were suggested whether that fourth finding, which I have just read, was intended to indicate that, as matter of fact, it would have been in ordinary course to case the pipe, or merely that the event proved that the pipe needed casing and that in that sense it ought to have been done; and it was urged before your Lordships, that there was nothing in those findings which I have just read inconsistent with the fact that the casing was a matter ordinarily added, or some substitute for it provided, in the course of the voyage, and that the precaution of either so casing the pipe or so fending off the cargo, as that it should not press upon the pipe might, for aught that appeared, be one ordinarily taken in the course of the voyage. In view of those arguments, the House directed that the case should be remitted to the Court of Session for further findings, and it is now found that in the case of vessels carrying jute, it is according to usual practice that a pipe such as that in question is cased before the cargo is loaded and the ship starts on her voyage. That after the *Tilkhurst* was loaded, the pipe in question was not visible or accessible without the removal of part of the cargo." It is true that it is found that the pipe might have been got at by the removal of a part of the cargo, though how much there was no evidence before the Court enabling them to say.

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(1) 3 App. Cas. 72.

Now, my Lords, I apprehend that those findings amount to a finding of unseaworthiness at the time when this vessel started on her voyage. Seaworthiness is thus defined by Lord Cairns, in the case to which I have already called attention :—" That the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic," or in performing whatever is the voyage to be performed. Now, my Lords, how is it possible to say that in that sense this vessel was seaworthy? Laden in that way, and being a ship such as she was, she had a pipe uncased in such a position and of such a character that if the ship rolled the water must be let in. That is a short statement of the facts; and really to say that a vessel of which that, under the circmstances, is a proper description is seaworthy would be, as it seems to me, to reduce the definition of seaworthiness to an absurdity. Therefore, my Lords, it appears to me that the findings amount to a finding that the vessel was not seaworthy.

But it is said that it is found that this was a " neglect or default " in the course of the voyage, and it is found that it might be remedied in the course of the voyage. In my judgment if it is found that the vessel was unseaworthy when she started, that is absolutely immaterial. The exception is only an exception which relieves the shipowner in the case of the vessel first starting on her voyage seaworthy. I can conceive cases in which a defect which constitutes unseaworthiness at the time of the disaster may have existed at the time when the vessel started, and yet it may have been a case not, properly speaking, of initial unseaworthiness but of neglect or default in the prosecution of the voyage. If, for example, some port-hole be left open, or there be some means of access for the water, which in the ordinary course of the prosecution of the voyage, if the master and crew were not negligent, would be closed, and which it is usual to leave open when starting, there is no doubt that although it existed at the time when the voyage commenced, it would properly be said not to be a case of unseaworthiness, but of "neglect or default" on the part of the master or crew. But this is not a case of that kind at all, because when you look at all the findings you see that it is obviously a matter not ordinarily remedied in the course of the voyage, but one constituting initial unseaworthiness and not at all of the character to which I have alluded.

My Lords, I do not think that there is anything inconsistent with this view in the fifth finding (1). It may be that the intention was in the fifth finding to find the case within the exception. If it found it within the exception in spite of unseaworthiness, then that was a decision running entirely counter to the decision of this House in *Steel and Craig* v. *State Line Steamship Company* (2), to which I have already alluded. If it was not such a finding, then it does not exonerate the defenders from the liability which rests upon them by reason of the other findings, which amount to this, that the cargo was damaged owing to the vessel having been unseaworthy at the time when she started on her voyage.

For these reasons I submit that the interlocutor appealed from ought to be reversed and judgment entered for the pursuers to the amount stated in the joint minute.

LORD WATSON:—

My Lords, it does not appear to me that your Lordships are, by the terms of sect. 40 of the Act of 1825, precluded from entertaining and deciding the questions raised upon the fifth finding (1), which, according to the terms of the interlocutor, professes to be one of fact. In my opinion that is not its true character. If not a pure finding in law, it appears to me to be a mixed finding of fact and law, and embodies the application of legal principles to the actual facts otherwise found. I rather think it was meant by the Court to be a finding to the effect that these facts did not constitute unseaworthiness in the sense of law, but merely amounted to such neglect of the master or crew as fell within the excepted risk. If the finding was merely intended to affirm neglect of the master or crew, that would not be necessarily inconsistent with or exclude the inference that the vessel was unseaworthy.

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(1) See ante, p. 58, finding No. 2 in printed case.

(2) 3 App. Cas. 72.

The facts found by the interlocutor appealed from and on remit sufficiently establish that the *Tilkhurst* was not in a condition to carry her cargo with reasonable safety unless and until the pipe which eventually led to the damage was properly cased. That defect must be regarded as a breach of the shipowners' implied warranty of seaworthiness if it ought to have been remedied before the voyage began. On the other hand, if the want of casing was such a defect as is usually and may conveniently and properly be set right in the course of the voyage, the failure to case was a negligent omission on the part of the master or crew, from the consequences of which it appears to me that the owners of the vessel would be protected by the terms of the bill of lading. It may in some cases be a very nice question whether the defect comes within the first or second of these categories.

In *Steel and Craig* v. *State Line Steamship Company* (2), the covering of one of the ship's port-holes was left unfastened, and on her encountering stormy weather sea-water was admitted by the port-hole and injured the cargo. The port-hole fittings in that case were structurally complete, which was not the case with the pipe in question. In remitting the cause for a new trial, Cairns, L.C., thus expressed the test which he thought should be applied for ascertaining whether the injury to the cargo was one due to unseaworthiness or to negligence in the course of navigation. His Lordship said (1): "It might have been that there was no want of fastening the port-hole when the ship sailed, that the port-hole may have been unfastened afterwards for any particular purpose, and then left insufficiently fastened, and that all this occurred in the course of the voyage through the negligence of one of the sailors; and if so, probably that would be a matter which would be covered by the exceptions in the bill of lading as a case of negligence occurring during the transit of the goods." The case put there, of course, has no analogy to the facts of the present case. But the next illustration which the noble and learned Lord puts in favour of the shipowner is in these terms: "Or it may be that if the port-hole was unfastened at the time of the sailing of the ship the port-hole may have been so situated and the access to the port-hole such as that at any moment, in prospect of any change of weather, the port-hole could have been immediately fastened; and that the ship at the time of her departure was perfectly free from any charge of not being adequate for the performance of the voyage which she had undertaken." The noble and learned Lord then proceeds to indicate the considerations which would raise in such a case the liability of the shipowners under their implied warranty, namely, "that the state of things with reference to this port-hole at the time the ship sailed was such that the state of the port-hole constituted a degree of unseaworthiness which could not at any moment, without considerable trouble, have been got rid of."

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(1) See ante, p. 58, finding No. 2 in printed case.

(2) 3 App. Cas. 72.

Applying these principles to the actual facts as found by the Second Division, I am unable to discover any ground for exempting the respondents from responsibility. The defect in the fittings of the *Tilkhurst*, which was the occasion of injury to her cargo, existed before she left Chittagong. That circumstance might not be sufficient to shew that she was unseaworthy so long as it could be reasonably suggested or inferred that the pipe could have been cased immediately, at any moment, without considerable trouble. But any such suggestion or inference is excluded by the express findings that, according to the usual practice of jute-carrying vessels, the pipe ought to

(1) 3 App. Cas. at p. 80.

have been cased before the vessel sailed, and that during the voyage the pipe was neither visible nor accessible without the removal of part of the cargo.

I therefore concur in the judgment which has been moved by the Lord Chancellor. I think that the judgment of the Second Division must be reversed, and that the appellants must have decree for the amount of damages settled by the joint minute.

LORD HALSBURY :—

My Lords, I am of the same opinion. I hesitate very much to give any opinion upon the extent and degree to which a vessel having a structural defect at the time of the commencement of a voyage could be prevented from being unseaworthy by something which might be contemplated to be done in the course of the voyage. It is not necessary, I think, to give any opinion upon that subject, because in any view of the law it appears to me that this case is outside any such possible contention. This vessel was structurally defective. The vessel was loaded, and it was not intended by any one that this particular portion of the vessel should be visited or interfered with or attended to in any way until the completion of the voyage. In the course of that voyage without any unusual peril of the sea, the damage was occasioned to the cargo in this vessel by reason of that structural defect which existed at the commencement of the voyage.

My Lords, I say that I hesitate—I should rather say I decline to enter into the question of what degree of defect may exist consistently with the performance of the obligation by the shipowners to have the ship in a seaworthy condition. I can understand some things which if permitted to continue would render the ship unseaworthy. Take the case of a hatchway remaining off, or anything of that sort in the ordinary contemplation of every business man or sailor that would be something which would be attended to in the course of the voyage, but if not attended to it would make the ship unseaworthy. I can imagine some things of that sort which if permitted to continue would make the ship unseaworthy and bring the case within the exception contemplated by the contract between the parties. But for my own part I do not know any case, and I hesitate, or rather, decline, to give any opinion upon the subject, where a vessel having an existing structural defect which it is not either usual or easy to remedy during the progress of the voyage, would be prevented from being unseaworthy, because it is a negligence or an omission which those on board might have remedied in the course of the voyage. It is enough, to my mind, to say that it appears to me sufficiently from the facts as found that this structural defect in the vessel did exist rendering the vessel manifestly unfit for the due and safe carrying of the cargo which she undertook to carry.

LORD MORRIS:—

My Lords, in this case it is found that a ship starts with a pipe uncased, though the usual practice is to case the pipe before the loading and starting of the ship. It is further found that the non-casing led to the pipe breaking, and consequently to the damage. It is further found that the non-casing was a default or neglect of the master or crew of the ship, and that the said default or neglect was committed by the master or crew in the ordinary course of the voyage. The bill of lading exempts from liability for any act, neglect, or default of the master or crew in the navigation of the ship in the ordinary course of the voyage. That exemption protects the defenders from the neglect or default of the master or crew in not casing the pipe during the voyage. I fail to see how it can exempt the defenders from liability for starting the vessel with a substantial structural defect in not casing the pipe. I see no inconsistency in the existence of two distinct defaults—viz., first, the default in starting with a non-cased pipe; secondly, neglect in not repairing and remedying that defect during the voyage. The bill of lading protects against the second neglect—it gives no exemption from liability for the first.

I concur in the judgment moved.

LORD FIELD concurred.

Ordered:—*That the interlocutor appealed from be reversed: cause remitted, with a direction that* *the pursuers are entitled to judgment for the amount stated in the joint minute; the respondents to pay the costs in this House and in the Court below.*

H. L. (Sc.)
1892
GILROY, SONS, & CO.
v.
PRICE & CO.

Lords' Journals 21st Nov. 1892.

Agents for appellants: *Waltons, Johnson, Bubb & Whatton for J. & J. Ross, W.S., Edinburgh.*

Agents for respondents: *William A. Crump & Son for Forrester & Davidson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

MANN AND BEATTIE . . . . APPELLANTS;

AND

EDINBURGH NORTHERN TRAMWAYS COMPANY . . . . RESPONDENTS.

H. L. (Sc.)
1892
Nov. 29.

Company—Expenses of Private Act—Receipt by Agent of Fixed Sum for Payment of such Expenses—Fiduciary Position—Liability to Account—Private Advantage—Ratification by Directors—Leave to Appeal, 48 *Geo.* 3, *c.* 151, *s.* 15.

The pursuers were a company incorporated by special Act for the construction of certain tramways, the Act containing the usual clause that the expenses of obtaining the Act should be paid by the company. The pursuers, through the defender "M." their solicitor, entered into an agreement with contractors for the execution of the work for £93,000, the contract providing that the expenses of procuring the special Act should be paid by the contractors. On the following day another agreement was entered into between the contractors, the defender "M." and the defender "B.," the latter being the engineer of the company. By this agreement the defenders undertook to relieve the contractors of the liability to pay the expenses of obtaining the Act, in consideration of a sum of £17,000; £5000 of which was paid in cash:—

Held, affirming the decision of the Court of Session (18 Court Ses. Cas. 4th Series (Rettie) 1140), that the defenders were liable to account for the £17,000, which they had received under the agreement, without charging against the pursuers any expense which was not within the definition of the clause of the Act, for the agreement, so far as it provided for the retention by the defenders of the balance of the £17,000, after defraying the

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expenses sanctioned by the Act, was illegal and void; that the facts did not shew any adoption of the agreement by the pursuers, but that even if the agreement had been adopted by the directors and shareholders, such adoption would have been ultrà vires the Act.

APPEAL from an unanimous judgment of the First Division of the Court of Session, Scotland, affirming the decision of the Lord Ordinary (Lord Trayner) (1).

The Edinburgh Northern Tramways Company, the respondents, were incorporated by an Act (47 & 48 Vict. ccxli.), which received the royal assent the 7th of August, 1884. G. V. Mann, one of the appellants, was the solicitor for the bill, and afterwards of the company. William Hamilton Beattie, the other appellant, was the engineer. The bill had for its object the introduction of the cable system of tramways on the steep gradient of the north side of Edinburgh. A similar bill had failed to pass through Parliament in 1882. The appellants, with certain other persons, were promoters of the bill, and they, with others named in the Act, had agreed to guarantee to a limited extent, the expenses necessarily incurred in obtaining the Act; and some of them, including the appellants, had also taken part in raising the deposit required in order that the Act might be obtained.

By sect. 78 of the Act, "All costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto shall be paid by the company." The capital of the company was £90,000 in 9000 shares of £10 each. Debentures also could be issued. There appearing to be no prospect of obtaining the capital from the public, the appellants were employed by their co-promoters in securing the aid of capitalists.

On the 24th of October, 1884, an agreement was entered into between the Patent Cable Tramways Corporation and the respondent company. It provided inter alia that the Cable Corporation should construct the tramway; and that they should pay or provide for the whole costs, charges, and liabilities incurred by the respondent company in obtaining the Act. The consideration was £93,000, payable to the extent of £5000 by the issue of 500 fully paid up shares, and the balance in monthly instalments on the certificate of the engineer, under the condition that failing payment in cash the Cable Corporation should be bound to accept Lloyd's bonds or fully paid up shares or mortgage debentures of the respondent company.

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(1) 18 Court Sess. Cas. 4th Series (Rettie), 1140.

The appellants, on the day following the 25th of October, 1884, executed a second agreement—admitted to have been negotiated at the same time with the first agreement—between themselves and the Cable Corporation which, after referring to the previous agreement, provided that the appellants should relieve the Cable Corporation of the liability for the expenses of the Act, in consideration of the Cable Corporation paying the appellants £17,000, as follows, £5000 in cash (which was actually paid on the 20th of September, 1884); £8,500 by the issue of debentures of the Cable Corporation, payable on the opening of any part of the respondent company's tramway; and £3500 by the transfer to the appellants of 350 fully paid up shares of the respondent company.

In 1889 the respondent company raised this action against the appellants, concluding for an account of all moneys, shares or debentures received by either of them as promoters of the tramway company, or in virtue of the agreement of the 25th of October, 1884. They alleged that £17,000 greatly exceeded the actual cost of obtaining the Act: and that it was only on the retirement of the first directors, on the 28th of February, 1888, that they were in a position to raise the action.

The appellants refused to furnish such account, claiming to be entitled to the agreement for their private advantage, and contended that the respondent company were barred from taking objection on the ground, as shewn by the minutes of the meetings of the directors of the respondent company, that the directors knew of the agreement of the 25th of October, 1884, and moreover made use of it when the Cable Corporation delayed execution of the contract and desired to withdraw. They also stated that the whole shares of the respondent company other than those held by themselves were held by representatives of the Cable Corporation, who controlled the respondent company; that no prospectus nor any of the shares of the respondent company had ever been issued to the public; that, at the 28th of February, 1888, of the 9000 shares, 4500 were issued, and that all these, except 152, were issued to the Cable Corporation; that of the latter 150 were issued to the first directors, and two to the first auditors; and that the mortgages issued were in favour of the Cable Corporation or of creditors of the company in payment of working expenses. The appellants relied upon the following minutes:—

August 19, 1884. "A copy of the Edinburgh Northern Tramways Act, 1884, under which the company is incorporated was laid before the meeting.

"It was remitted to Mr. Mann and Mr. Beattie to make such inquiries in London or elsewhere, as they may consider necessary, with a view to determine the best system of traction to be adopted for the undertaking, and to obtain such information as is necessary with reference to the raising of the capital. Mr. Mann and Mr. Beattie were instructed to confer on the subject with Mr. Waddell and Mr. Couper (two directors) on behalf of the board, with power to solicit offers from persons likely to enter into suitable arrangements, both as regards construction and capital; advertise for tenders, and take such other steps as they may think necessary, with power to employ such financial, legal, or other personal assistance in London as they may deem requisite."

October 13, 1884. "Tender from the Cable Corporation opened and read, being the only tender received."

April 18, 1885. "Notice having been received from Mr. Mann and Mr. Beattie that they claimed all shares of the company which have been or may hereafter be issued under the contract between the company and the Cable Corporation, it was resolved that no transfer of any such shares be registered or recognised by the company until the rights of the respective transferors and transferees have been substantiated as against Messrs. Mann and Beattie, and that notice be given to Mr. Rixon (the company's London solicitor for this purpose), to that effect."

September 28, 1885. "A copy of correspondence between the Cable Corporation and Mr. Rixon was submitted and considered.

"The meeting was of opinion that it would not be advisable to meet the Cable Corporation as suggested by them until they submitted some definite proposal for settlement.

"The meeting was further of opinion that proceedings should be taken against the Cable Corporation to enforce their contract, and that, subject to the approval of Mr. Rixon, Messrs. Mann and Beattie be requested to sue the corporation for the expenses of and incidental to the formation of the company, and which the corporation had undertaken to pay, it being understood that, should such proceedings terminate successfully, it should be left to the board, and if necessary recommended for confirmation by the shareholders, to say what amount should be paid to Messrs. Mann and Beattie to cover their loss of time and cash expenditure in the matter.

"Mr. Waddell was requested, when in London this week, to consult with Mr. Rixon as to the course to be followed.

"Mr. Mann advised that steps might be taken to enforce the liquidation of the Cable Corporation under the Companies Acts, and Mr. Waddell said he would see Mr. Rixon on this subject also."

It may be stated here that there were three actions raised in England: (*a*) An action by the respondent company against the Cable Corporation; (*b*) one by Mann and Beattie against the same and counter-claim; and (*c*) a summons by one Jackson against the respondent company to compel registration of ten shares transferred to him from the Cable Corporation. There was also an action raised in Scotland at the instance of the Cable Corporation against the respondent company and Mann and Beattie for reduction of the contracts of the 24th and 25th October, 1884. Eventually the English proceedings were compromised on the 31st of May, 1886, and an order of Court dealt with the two agreements. Other minutes were: November 10, 1885. "Mr. Mann stated that he and Mr. Beattie had, at the request of the chairman, who had been advised by Mr. Rixon, raised an action in the English Courts against the Cable Corporation to compel the corporation to implement the agreement with them for settlement of the cost and expenses of and incidental to the obtaining of the company's Act of incorporation, and which Mr. Rixon was of opinion would be the best way of bringing the repudiation of the Cable Corporation of their contract with the company to a speedy issue." December 8, 1885. "At a meeting of the company there was submitted a letter from the corporation making proposals for a compromise . . . ." February 25, 1886. "Copies of the proceedings in the action at the instance of Mr. Mann and Beattie against the Cable Corporation were laid before the meeting and considered. May 31, 1886. "Mr. Mann stated that he had this morning returned from London, and reported the negotiations which had taken place with the Cable Corporation. He laid before the meeting a copy of the heads of agreement embodying the terms of settlement. The meeting went over the agreement and approved thereof, and the same was sealed with the company's seal. . . ."

Part of the works were executed by the Cable Corporation's sub-contractors, Messrs. Dick, Kerr & Co., and were opened for traffic on the 28th of January, 1888. On the 14th of January, 1888, the Cable Corporation was wound up. Messrs. Dick, Kerr & Co., were creditors for work done. For money advanced the Assets Realization Company held an assignment from the Debenture Corporation, alleged to be subject to the agreements of the 24th and 25th of October, 1884, of the more valuable assets of the Cable Corporation, including all payments of cash and shares to be received under the agreement of the 24th of October, 1884. The Debenture Corporation had acquired right to these assets for cash advanced to the Cable Corporation. Under these deeds the Assets Realization Company held at the date of the winding-up of the Cable Company 3190 out of the 4500 shares issued by the respondent company.

By deed, dated 22nd of May, 1888, Messrs. Dick, Kerr & Co. purchased the interest in the assets of the Cable Corporation, held by the Assets Realization Company, and scheduled to the deed were the agreements of the 24th and 25th of October, 1884.

It appeared from the proof that Mr. Turnbull (a director), being absent from England in October, 1884, on his return, asked Mr. Mann for an explanation in regard to the expenses incurred in obtaining the Act, which Mr. Mann declined to give. Mr.

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Turnbull afterwards resigned his seat at the board, and disposed of his shares to the appellants.

On the 18th of July, 1890, the Lord Ordinary (Lord Trayner) found that the appellants were bound to account to the respondent company for the whole sums of money, debentures, shares, or other considerations received by them, under, and in virtue of, the agreement entered into between them and the Cable Corporation, dated the 25th of October, 1884, and directed the appellants to lodge an account, &c., with vouchers.

On the 14th of July, 1891, the First Division of the Court of Session unanimously affirmed this decision (1); and on the 15th of July, 1891, refused the appellants leave to appeal to this House, on the ground that, if leave were granted, there was risk of there ultimately being two appeals instead of one (2).

The appellants lodged their appeal, and the respondents petitioned that it might be dismissed as incompetent under 48 Geo. 3, c. 151, sect. 15.

In December, 1891, the appeal committee dismissed the respondents' petition, and allowed the appeal to proceed, on the ground that, if the appellants were right in their contention, there would be no necessity for an account, and no risk of a second appeal.

On appeal,

1892. Nov. 28, 29. Sir *John Rigby*, S.G., and *Henry Johnston* (of the Scotch Bar), for the appellants:—

First, the agreement of the 25th of October, 1884, was a valid agreement, the appellants being entitled to any profit they might have made under it; secondly, it must be taken on the facts that all the members of the respondent company had adopted and acquiesced in the agreement; moreover, the directors had made use of it in the action against the Cable Corporation; Messrs. Dick, Kerr & Co. were affected by the knowledge possessed by their transferors; the auditors were also fully aware of what had been done, and it must follow that all the existing shareholders are barred from now challenging the agreement.

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(1) 18 Court Sess. Cas. 4th Series Rettie), 1140.

(2) 18 Court Sess. Cas. 4th Series (Rettie), at p. 1152.

[They cited, *In re Ambrose Lake Tin and Copper Mining Company, Ex parte Taylor and Moss* (1); *In re Gold Company* (2); *Phosphate Sewage Company* v. *Hartmont* (3). And Lord Herschell, L.C., mentioned *Ashbury Railway Carriage and Iron Company* v. *Riche* (4): and the *Caledonian and Dumbartonshire Railway Company* v. *Magistrates of Helensburgh* (5).]

A. Graham Murray, Q.C., and *Salvesen* (both of the Scotch Bar), appeared for the respondents, but were not called upon.

LORD HERSCHELL, L.C.:—

My Lords, in the year 1884, on the 7th of August, an Act was obtained, called the Edinburgh Northern Tramways Act, which authorized the making of certain tramways in the city of Edinburgh. That Act was promoted by Messrs. Mann & Beattie, who were respectively law agent and engineer, and it was no doubt promoted also by certain other persons named in the Act, who had agreed, to a limited amount, to guarantee the expenses which were necessarily incurred for the purpose of obtaining the Act; and they had also, some of them, taken part in raising the deposit required in order that the Act might be obtained.

The Edinburgh Northern Tramways Company, having obtained the Act for the purpose of establishing cable tramways in Edinburgh, sought to obtain a contract with another company, in order that the tramways might be made and the necessary works constructed. They ultimately entered into an agreement of the 24th of October, 1884, with the Cable Corporation, who for a certain sum of money were, as provided in that Act, to construct the tramways and to pay all the expenses of and incidental to obtaining the Act, which, by sect. 78 of the Act, it was provided should be paid by the tramways company. That was the agreement, so far as it appeared, between the tramways company and the Cable Corporation. The sum of £93,000 was, not all of it, to be paid in cash, but it was to be paid partly in cash and partly in shares. I need not trouble your Lordships with the particulars of the payments to be made, because nothing turns upon it.

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(1) 14 Ch. D. 390.
(2) 11 Ch. D. 701.
(3) 5 Ch. D. 394.
(4) Law Rep. 7 H. L. 653.
(5) 2 Macq. 391; 15 Court Sess. Cas. 2nd Series (Dunlop), 148; reversed 19 Court Sess. Cas. 2nd Series (Dunlop), (H.L.), 6.

It appears that at the same time as that agreement was entered into, that agreement being negotiated by Messrs. Mann and Beattie, another agreement was entered into between the corporation and Messrs. Mann and Beattie, of course negotiated also by themselves. It bore date the 25th of October, the following day; but it is admitted, and there can be no doubt of the fact, that these two agreements were under negotiation at the same time, Messrs. Mann and Beattie acting on behalf of the company and on behalf of themselves in effecting these two agreements. This second agreement provided that, whereas by the agreement of the 24th of October the Cable Corporation were to bear and pay the expenses of obtaining the Tramways Act, in lieu of their so paying the expenses they were to pay to Messrs. Mann & Beattie £17,000; and Messrs. Mann and Beattie were then to see to the payment of the expenses. My Lords, I have said that they were to pay £17,000, but the whole of it was not to be paid in cash. £5000 was to be paid in cash, and a portion of it to be paid in debentures by the Cable Corporation. I have not lost sight of that fact; but it is immaterial in the view which I take of this case, and I shall speak hereafter of this as a sum of £17,000, although I am quite alive to the fact that it was not all cash payment.

Now, what was the real nature of this agreement? It is obvious that, in estimating the £93,000 which was to be paid by the tramways company to the Cable Corporation, £17,000 of it was estimated as paid for the amount of these expenses; because this whole agreement was under negotiation at the same time. In reality, therefore, the tramways company would pay £93,000, less £17,000, for the works which were to be done in constructing the tramway, and they were to pay (because that is what it amounts to, although it is carried out by this machinery) the balance for the purpose of discharging the expenses; and that balance was not merely to go to the discharge of the expenses so far as expenses had been incurred; but if there was a surplus

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over those expenses after they had been paid without exhausting the £17,000, that surplus was to be kept by Messrs. Mann and Beattie. The real effect of the transaction, therefore, was this—that one is to treat £76,000 as paid for works, and £17,000 (or whatever the payment really represented—as I said, I will call it £17,000) as paid in effect to Messrs. Mann and Beattie, in order that out of it they might pay the expenses incurred in obtaining the Act, and keep the residue for themselves.

The question is whether that transaction can stand as against the company. There is no contest raised as to the right of Messrs. Mann and Beattie to retain all that is necessary for the purpose of discharging every expense authorized to be discharged under sect. 78 of the Act. The only question is whether they are bound to account, and shew how much they have so expended, or whether they can keep the residue, however great it may be, beyond those expenses, for their own benefit.

The Lord Ordinary has found that that second agreement was not communicated, at the time when it was made, to the directors of the company. He has arrived at that conclusion of fact after seeing and hearing the witnesses. It would need a very strong case indeed to induce your Lordships to depart in any way from his finding. I see not the slightest ground for doing so; and, therefore, it must be taken that this was an agreement to which no reference was made in the agreement which was submitted to the company, and that it was entered into, therefore—there being no communication of it—behind the backs of the company and of those who represented them—the directors.

That was the state of things at the time when this agreement was made. It is said that afterwards the agreement became known to the company. I cannot see any evidence that it became known to the company until at the earliest—February, 1886. But, even then, when the agreement undoubtedly was brought under the notice of the directors, all that appears is that certain pleadings were brought to their notice; certain proceedings in an action which was then pending were discussed; and throughout I see again no evidence to justify your Lordships in departing from the further finding of the Lord Ordinary, that after the agreement was brought to the knowledge of the directors, though they knew of it they never either approved or adopted it.

Now, my Lords, upon these findings in relation to the facts which I have stated to your Lordships, it seems to me impossible that any but one conclusion can follow, namely, that Messrs. Mann and Beattie cannot retain for their own benefit any surplus after the payment of the expenses.

It has been said that there are now no shareholders in the company who have not become aware of this agreement, and therefore the company cannot be in a position to insist that its terms shall not be carried out. My Lords, I am not satisfied that that is established. The sub-contractors who purchased from the Assets Realization Company and received a large number of the shares in this company, it is said, had notice of the agreement of the 25th of October, 1884; but that they had notice of that agreement, of its contents, and of the circumstances connected with it, which prevent its validity against the company, appears to me to be very far from proved; and, therefore, I am not satisfied at all that that fact is established on the part of the appellants. But, my Lords, even if it were, it does not seem to me to be material in this case. I think the fact has been lost sight of in the appellant's argument that this is a company created by Act of Parliament, which has no right to spend a penny of its money except in the manner provided by the Act of Parliament. The Act of Parliament provides that the capital is to be raised for the purpose of being expended in making a cable tramway. The only other expenditure authorized by the statute is the expenditure authorized by sect. 78, and I am unable to find here any authority, however much the directors may have agreed to and ratified it and approved of it, which enables this company to spend any of its assets except for those purposes.

My Lords, that this is the law has been established and recognised for a long series of years. In the case of the *Caledonian and Dumbartonshire Railway Company* v. *Magistrates of Helensburgh* (1), it was sought to enforce an agreement made with

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(1) 2 Macq. 391; 15 Court Sess. Cas. 2nd Series (Dunlop), 148; reversed on appeal, 19 Court Sess. Cas. 2nd Series (Dunlop), (H.L.), 6.

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the promoters of the company and to secure a declaration of its validity as against the company. Of course, as regards the facts, that case differs from the present, inasmuch as there the agreement sought to be enforced was one made with the promoters; but the reasoning of the learned Lord Chancellor, and the grounds upon which he bases his judgment, are strongly applicable to the proposition which I have just laid down. The Lord Chancellor says: "When such a body apply for an Act of incorporation, what they ask for of the Legislature is not an Act incorporating and giving powers to those only who are applying, not necessarily even incorporating and giving powers to any of them, but an Act incorporating all persons who may be willing to subscribe the specified sums, and so to become shareholders in the company. If the Legislature accedes to such an application the Act when passed becomes the charter of the company, prescribing its duties and declaring its rights, and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out to them by the Act, and liable to no obligations beyond those which are there indicated. If this be not the true principle the Legislature must be making itself ancillery to serious injury. When a capitalist, believing in the probable success of any particular project sanctioned by the Legislature, is satisfied with the terms of incorporation embodied in the Act, he reasonably advances his money on the faith of those terms; and if the project turns out a failure he has no right to complain. The speculation was one as to the prudence of which he had the means of judging, and no injustice is done to him if in the result he sustains a loss. But surely the case is very different if, behind the terms of incorporation expressed in the Act, there are others of which the public have no notice, but which are to be held equally binding on the shareholders as if they had formed part of the charter of incorporation." The learned Lord Chancellor then goes on to lay it down that the only modes in which a company can apply its funds are those prescribed by its Act of incorporation, which is its charter. And in the case of *Earl of Shrewsbury* v. *North Staffordshire Railway Company* (1), that is very distinctly indicated as the ground of the judgment in the very instructive judgment of Vice-Chancellor Kindersley, who points out that where the expenditure of money is for a purpose unauthorized by the Act it is ultrà vires, and there is no power in the company validly to make that payment. If that be so, my Lords, no approval of those who may happen to be directors at the time when the company is formed, or of those who may happen at that time to be all the shareholders in the company, can possibly give it validity, because it is something which the company itself cannot do, and which it cannot be authorized to do either by its then directors or by its then shareholders.

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(1) Law Rep. 1 Eq. 593.

In the present case the 78th section, as I have said, has sanctioned expenses, costs, and charges coming within the definition of that section. But the payment of any money whatsoever to Messrs. Mann and Beattie, not necessary for the discharge of those obligations, is a payment out of the assets of the company, that is in effect out of the money of the company (because in spite of the machinery by which this was effected that is what it comes to) which the company have no right to apply in the manner in which they do apply it, if Messrs. Mann and Beattie keep anything beyond the sum necessary to discharge those expenses.

My Lords, I can see nothing that has been done by this company or its directors which in the slightest degree bars the company from now coming to maintain that, beyond the sum necessary to discharge the obligations prescribed in the 78th section, there can be no right in Messrs. Mann and Beattie to retain any of the moneys which they claim under the agreement of the 25th of October, 1884.

For these reasons, I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON :—

My Lords, this case appears to me to be equally plain in fact and in law. The effect of the separate agreement of the 25th of October was, in my opinion, the same as if it had been embodied in the contract of the 24th of October, 1884. In substance it was an arrangement that the appellants should receive £17,000

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out of the moneys of the tramways company, and out of that they were to pay the costs and charges sanctioned by sect. 78 of the Act of incorporation, and to keep the balance, if any, to themselves. So far as regarded the balance, that agreement was plainly illegal and void. It would be intolerable that persons, employed by a company to make a contract on its behalf, should be able either directly or indirectly to secure a pecuniary advantage to themselves, for which they have given no consideration, at the company's expense.

But the appellants allege on record that the terms of the agreement "were known to and approved by the pursuers' company." The Lord Ordinary has found "that it is not proved that the agreement between the Cable Corporation and the defenders was brought to the knowledge of the directors until long after it was concluded and partly implemented," and that "when brought to the knowledge of the directors it was never approved or adopted." The learned counsel referred your Lordships to some portions of the evidence for the purpose of shewing that the conclusions of fact at which the Lord Ordinary arrived were not well founded, with the result, I believe, of satisfying your Lordships that those findings, which were adopted in the Inner House, are substantially accurate.

My Lords, it is clear that the terms of the agreement of the 25th of October must have come to the knowledge of the directors in February 1886, when they were submitted to and considered by them; but there is no indication to be found in the Minutes, and, I assume, no reliable evidence adduced orally, to shew that at that time or after that date they were adopted by the directors. But I desire to say that in that state of facts, I entirely concur in the law as laid down by the Lord Chancellor.

In the case of *Preston* v. *The Liverpool, Manchester, &c., Railway Company* (1), the same law as is explained by the Lord Chancellor in *Caledonian and Dumbartonshire Railway Company* v. *Magistrates of Helensburgh* (2), was given effect to. No doubt these cases applied to promoters who had endeavoured to bind the company by a contract made before its incorporation, but the ratio of the judgments applies with equal force to contracts or agreements made by the directors of a company after incorporation; and not only to directors, but, I apprehend, to corporators. In my opinion, they establish the doctrine that it is beyond the power either of promoters or of directors or of shareholders to apply the moneys of the company which are devoted by statute to special purposes to any purpose which is not sanctioned by the provisions of the Act of incorporation. So that even assuming that the appellants had been able to prove the facts contended for by them, in which they have failed, their case would have been, in my opinion, no better.

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(1) March 4, 1856. 5 H. L. C. 605; 1 Sim. (N.S.) 586; 17 Beav. 114.

(2) June 19, 1856. 2 Macq. 391; 15 Court Sess. Cas. 2nd Series (Dunlop), 148; reversed on appeal, 19 Court Sess. Cas. 2nd Series (Dunlop), (H.L.), 6.

LORD ASHBOURNE :—

My Lords, I entirely concur in the judgment announced by my noble and learned friend, the Lord Chancellor, and my noble and learned friend who has just spoken. The contention of the appellants is fraught with peril to the shareholders, present and future, of all companies. The appellants insist on the validity of an agreement under which they were to receive £17,000 for the costs, charges, expenses, and payments therein referred to. This sum was to be given as a bulk sum, not subject to review, account, or audit. It is hardly disputed that, after paying all proper outgoings, a substantial sum would or might remain over for the personal profit of the appellants. I myself believe, after listening to the argument and reading the documents in evidence, that a very substantial sum would be available for the personal profit of the appellants. But the appellants' case does not turn on more or less. They must contend that, whether the whole or only a small part of the £17,000 might be for their own profit, when once knowledge was brought home to those who chanced at the moment to represent the company, it cannot be impugned. On the fact of knowledge, I am deeply impressed by, and concur in, the clear judgment of Lord Trayner, and I am not satisfied that knowledge is shewn at the time of the agreement, or, probably, for a very considerable time afterwards; but slender as is the evidence of knowledge, I see still less evidence of acquiescence. Assuming, however, knowledge, where was the authority to warrant the directors or the company in sanctioning this great payment? It was not covered by the terms of sect. 78, and we have been referred to no other authority. There is nothing else in the facts to justify it or to prevent its being ultrà vires, whilst there are powerful and persuasive arguments to be gathered from the evidence, oral and documentary, to make the whole transaction most questionable.

LORD MORRIS:—

My Lords, I concur in the judgment pronounced, and in the reasons which have been given for it. In my opinion the question in the case is not so much the fiduciary character of the appellants and their consequent liability to account, nor whether the respondents' company knew of, approved, or ratified the agreement of the 25th of October, but rather as to its power to ratify such an agreement. I have not heard any convincing argument to establish that the company itself would not be acting ultrà vires in ratifying such an agreement. I apprehend that the company itself could not have entered into such an agreement when it was clearly one which authorized the appellants to charge the company and to get payment out of its funds for £17,000 in the name of expenses, but which really included promotion money, or other bonus, or other expenses extra those incurred in obtaining the Act; and if the company could not make such an agreement I fail to understand how the company could ratify it when made by their trustees, the appellants.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, Nov. 29, 1892.

Agent for appellants: *A. W. Rixon, for A. & G. V. Mann, S.S.C., Leith.*

Agents for respondents: *Linklater & Co, for Graham, Johnston & Fleming, W.S., Edinburgh.*

[HOUSE OF LORDS.]

CALEDONIAN INSURANCE COMPANY . APPELLANTS; H. L. (Sc.)

AND 1892

ANDREW GILMOUR . . . . RESPONDENT. *Dec.* 16.

Arbitration—Fire Policy—Arbiters not named—Contract depending upon the Clause—Action excluded until Arbitration—Appeal—Delay—Costs.

A policy of fire insurance provided, inter alia, that "where the company did not claim to avoid its liability under the policy on the ground of fraud, or non-fulfilment of any of the conditions therein set forth, but a difference at any time arose between the company and the insured as to the amount payable in respect of any alleged loss or damage by fire, every such difference when and as the same arose should be referred to the arbitration of persons chosen by the parties"; and it was expressly "declared to be a condition of the making of the policy," where the company did not deny liability on the ground of fraud or non-fulfilment, "that the insured should not be entitled to commence any action at law" "till the amount should have been awarded as thereinbefore provided," and that the "obtaining such an award should be a condition precedent to the commencement of any action upon the policy." The arbiters were not named in the policy:—

Held, reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 1219), first, that the condition to ascertain the damage by arbitration was incorporated with and formed an integral part of the contract of indemnity, and was a condition precedent to the bringing of any action upon the policy. Secondly, that the contract, being one upon which no cause of action accrued until the amount of damage had been determined by arbitration, was excepted from the rule of Scotch law that a reference to arbiters not named cannot be enforced.

Scott v. *Avery* (5 H. L. C. 811) followed.

APPEAL against six interlocutors of the Court of Session, Scotland, in an action raised by Andrew Gilmour, the respondent, against the Caledonian Insurance Company, the appellants, for £1700, or the amount he might prove to be payable by the appellants, as insurers of the respondent's tenement under a policy of fire insurance. The appellants offered £1350.

The only question argued in the appeal was, whether the action on the policy ought to have been postponed pending a decision of arbitrators as to the amount of damage.

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The policy was dated the 21st of November, 1882, and renewed from year to year. The tenements insured were destroyed by fire in February, 1891.

The policy contained this condition indorsed upon it:—

No. 13. "Where the company does not claim to avoid its liability under the policy, on the ground of fraud or non-fulfilment of any of the conditions hereinbefore set forth, but a difference at any time arises between the company and the insured, or any claimant under this policy, as to the amount payable in respect of any alleged loss or damage by fire, every such difference, when and as the same arises, shall be referred to the arbitration of one person to be chosen by both parties, or of two independent persons . . . . who should choose an umpire. And it is hereby expressly declared to be a condition of the making of this policy, and part of the contract between the company and the insured, that where the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment, as aforesaid, the party insured or claimant shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition precedent to the commencement of any action or suit upon the policy."

The appellants contended that the action ought to be postponed pending the decision of the respondent's claim by arbitration. The respondent maintained that, inasmuch as the clause referred to arbiters, who were not named, the clause could not be set up in answer to his claim.

On the 23rd of June, 1891, the Lord Ordinary (Lord Stormonth-Darling) repelled the appellants' contention; and on the 18th of July, 1891, the First Division pronounced an unanimous judgment affirming the Lord Ordinary's decision.

A proof was allowed by the Lord Ordinary on the 16th of October, 1891; and on the 7th of November following the appellants asked leave to appeal to this House against the interlocutors of the 23rd of June and the 18th of July. On the 10th of November, 1891, leave to appeal was refused; the Lord President

(Robertson) said: The petitioners have not evidenced any anxiety to save expense to the opposite party by bringing the application timeously, and the petition had been presented on the eve of the proof, and does not therefore come before the Court favourably.

After a proof had been led, the Lord Ordinary on the 2nd of December, 1891, found £1500 to be payable by the appellants in full of the sum sued for and interest. This decision was affirmed by the First Division on the 9th of March, 1892 (1).

On appeal,

Nov. 22. 1892. Sir *Horace Davey*, Q.C., and *Ure* (with them *McClure*), (both the latter of the Scotch Bar), for the appellants:—

The interlocutor of the 18th of July, 1891, is erroneous; for by the contract the respondent is not entitled to bring an action for the damage which he has sustained, but only for an amount to be determined by arbitration. The general rule of Scotch law that a mere agreement to refer disputes and differences which may arise to unnamed arbiters cannot be enforced is not disputed. But here the arbitration clause is strictly limited to the amount payable under the policy, and there is nothing in question except the assessment of such amount. The only contract for payment is an agreement to pay what may be ascertained in a particular way; and until the arbiters have ascertained the amount of the loss no cause of action can arise. The case is one of those which are an exception to the general rule, and that rule does not apply. See Bell on Arbitration (1861 ed.), 85; *Munro* v. *Mackenzie* (18 Dec. 1823) (2), a contract to take sheep at a valuation to be made by arbiters; *Dixon* v. *Campbell* (25 June, 1830) (3), an agreement that a lease of coal shall terminate when the coal is reported by persons of skill, mutually chosen, to be unworkable to profit; *Smith* v. *Wharton, Duff, and Others* (28 Feb. 1843) (4), an agreement that a landlord may resume possession of land on paying compensation to be fixed by arbiters. There Lord Fullerton said: In this class of case . . . "the reference is necessary to liquidate the obligation come under by the contract. Where the price is to be fixed by reference, that is not a dispute arising between the parties, but something necessary to liquidate part of the contract. When the reference is essential to liquidate the obligation come under by the party, it is good, though to a person not named. If not, what would become of the obligation?" See also *Merry and Cunninghame* v. *Brown* (15 July, 1859) (1); *Orrell* v. *Orrell* (22 Feb. 1859) (2); *Ramsay* v. *Strain* (6 Feb. 1884) (3). And the cases the respondent will rely on are *Hendry's Trustees* v. *Renton* (28 May, 1851) (4), *Howden & Co.* v. *Dobie & Co.* (16 March, 1882) (5) and *Tancred, Arrol & Co.* v. *Steel Company of Scotland* (in this House in 1890) (6). The similar case of *Scott* v. *Avery* (7) in England decided that until the arbiters awarded the sum there was no cause of action.

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(1) 18 Court Sess. Cas. 4th Series (Rettie), 1219.

(2) 2 Court Sess. Cas. 1st Series (Shaw), 593, (2nd Ed.), 508.

(3) 8 Court Sess. Cas. 1st Series (Shaw), 970.

(4) 5 Court Sess. Cas. 2nd Series (Dunlop), 749, at p. 752.

Sir *John Rigby*, S.G., *Salvesen* (of the Scotch bar), and *E. B. Pymar*, for the respondent:—

The cases relied on by the appellants were cases where, if the arbitration had not proceeded, the contract between the parties could not have been fulfilled. They were mere questions of assessment or valuation with reference to existing subjects by persons of skill without the aid of a judicial tribunal. Here the contract without the clause is a complete contract to pay damage caused by fire out of the capital funds of the company. *Munro* v. *Mackenzie* (8) was an arrangement for a simple valuation. In *Orrell* v. *Orrell* (2) all that was to be done was to wind up the partnership in a particular manner. There is a marked distinction between those cases and the present, where there must be a judicial inquiry into facts concerning the property insured involving the character and age, &c., of the buildings, and what they contained at the time of the fire. Such an inquiry is not a mere valuation, but a judicial inquiry proper for investigation in the Courts. *Wight* v. *Earl of Hopetoun* (29 Nov. 1855) (1), and *Hendry's Trustees* v. *Renton* (2) were in the respondent's favour. [They also cited *Tancred, Arrol & Co.* v. *Steel Company of Scotland* (3).]

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(1) 21 Court Sess. Cas. 2nd Series (Dunlop), 1337, at p. 1343; 1 Court Sess. Cas. 3rd Series (Macpherson), (H.L.), 14.

(2) 21 Court Sess. Cas. 2nd Series (Dunlop), 554, at p. 558.

(3) 11 Court Sess. Cas. 4th Series (Rettie), 527.

(4) 13 Court Sess. Cas. 2nd Series (Dunlop), 1001, see p. 1007; 23 Scotch Jurist, 400.

(5) 9 Court Sess. Cas. 4th Series (Rettie), 758.

(6) 15 App. Cas. 125.

(7) 5 H. L. C. 811.

(8) 2 Court Sess. Cas. 1st Series (Shaw), 593 (2nd ed.), 508.

Sir *Horace Davey*, Q.C., in reply.

Judgment after consideration.

LORD HERSCHELL, L.C.:—

My Lords, the simple question raised in this case is whether the respondent was entitled to recover from the appellants, under a policy of insurance against fire, the amount of damage which he might prove that he had sustained within the sum of £1700, or whether, by reason of one of the conditions indorsed upon the policy, the respondent was precluded from bringing an action in respect of loss sustained by fire until he should have obtained an award in the manner provided by that condition, determining the amount due to him.

It was contended on behalf of the respondent, and the Court below has yielded to that contention, that inasmuch as the clause relating to arbitration provided for a reference to unnamed arbitrators, the jurisdiction of the Courts was not ousted, and that the arbitration provision could not be set up in answer to the pursuer's claim.

It cannot be disputed that it is well settled law in Scotland that a mere agreement to refer disputes that may arise to unnamed arbitrators does not of itself oust the jurisdiction of the Courts, and would not prevent the enforcement in a Court of Law of a claim arising under other parts of the same contract, even though that claim were in dispute, and the party seeking to enforce it had refused to concur in an arbitration.

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(1) 18 Court Sess. Cas. 2nd Series (Dunlop), 118.

(2) 13 Court Sess. Cas. 2nd Series (Dunlop), 1001; 23 Scotch Jurist, 400.

(3) 15 App. Cas. 125.

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But it is to be observed in the present case that, under the policy, the only contract on the part of the appellants to make any payment at all is a contract to pay the sum ascertained in a particular manner, viz., by the arbitration provided for by the 13th condition of the policy. This condition is expressly incorporated in the body of the policy, and must be read into that part of it which alone provides for the payment of money by the company, with the same effect as if it had been specifically inserted there, and the obligation had been in terms qualified by it.

I think this circumstance was overlooked in the Court below. The question is not whether where a contract creates an obligation to pay a sum of money it is a good answer to an action to recover it that disputes have arisen as to the liability to pay the sum, and that the contract provides for the reference of such differences to arbitration, but whether where the only obligation created is to pay a sum ascertained in a particular manner, where, in other words, such ascertainment is made a condition precedent to the obligation to pay, the Courts can enforce an obligation without reference to such ascertainment? If they could do so they would not be enforcing the contract made by the parties, but one of a different nature.

I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Watson, and I find that he has so fully dealt with the Scotch authorities on this point that it is not necessary for me to do so. I was satisfied at the close of the argument, not only that there was no authority in the law of Scotland for the proposition that in the case of such a contract as I have indicated the Courts would disregard the qualified character of the promise, and enforce the obligation as if it had been an unqualified one, but that there was weighty authority the other way. Subsequent consideration of the authorities has confirmed me in this view.

I may add that the reasoning of the noble and learned Lords who took part in the decision of *Scott* v. *Avery* (1) appears to me completely applicable to the present case. Its cogency is not affected by any of the distinctions which then existed between the law of England and that of Scotland in relation to arbitration clauses.

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(1) 5 H. L. C. 811.

I entirely concur in the reasons expressed by my noble and learned friend in his opinion, and think the interlocutors appealed from must be reversed.

With regard to the question of costs, it is to be observed that the question whether the condition relating to arbitration would be an answer to the action was raised and determined at an early stage of the action. After its determination, but not immediately after, application was made on behalf of the present appellants to stay further proceedings in the action until there had been an appeal from those interlocutors, pursuant to the leave of the Court, against the decision of the Court of Session. That application was refused by the Court, but not on the ground that it was not an application proper to have been considered and acceded to if it had been made at the proper time, but on the ground that inasmuch as that application had been delayed until the parties were close upon the proof, it was not right at so late a stage to accede to the application then made. There can be no doubt, I think, that if the application had been made earlier the Court would have acceded to it, and the subsequent costs in the action might have been avoided. There does not appear to have been any very great difference between the parties as to the amount which the plaintiff ought to recover upon this policy, and I imagine there can be no doubt that this appeal has been proceeded with, and argued at your Lordships' Bar, not by reason of the importance of any difference between the parties as to the amount to which the plaintiff was entitled under his policy of insurance, but because the question whether the condition afforded an answer to an action, whether it was necessary in the first instance to ascertain the loss in the manner provided by the policy was a question of general importance affecting all the policies of the appellants.

My Lords, under these circumstances I cannot but think it would be unfortunate that in this case there should need to be another inquiry into the amount of loss which the respondent has sustained. The course, therefore, which I propose to your Lordships is this: Whilst giving judgment for the appellants, reversing the interlocutors, and dismissing the action, to reserve the question of costs for further determination, in order that an opportunity may be given to the parties of conferring with regard to the matters to which I have called your Lordships' attention. Possibly an agreement between them may render it unnecessary for the House to determine the question of costs; if not, it will be determined upon a future occasion.

Lord Watson:—

My Lords, this is an action by the respondent for the full amount of an insurance effected with the appellant company upon a tenement of shops and dwelling-houses belonging to him, which were destroyed by fire in February, 1891. By the terms of the policy the company agreed with the insured, "subject to the conditions on the back hereof, which are to be taken as part of this policy," to pay or make good such loss or damage to an extent not exceeding £1700. The thirteenth condition is to the effect that, when the company does not claim to avoid its liability on the ground of fraud or non-fulfilment of the conditions of the policy, any difference arising as to the amount payable in respect of any alleged loss or damage by fire shall be referred to the arbitration either of one person chosen by both parties, or of two persons, one appointed by the insured and the other by the company, who shall name an umpire before they enter upon the reference. Provision is made for keeping up the submission in case of the failure of either party to nominate, or of the death of an arbiter or umpire; and it is declared that the award of the arbiters or umpire shall be finally binding upon all parties. It is further declared to be a condition of the policy, and part of the contract between the company and the insured, that "the party insured shall not be entitled to commence or maintain any action at law or suit in equity on this policy, till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition precedent to the commencement of any action or suit upon the policy."

A difference did arise as to the amount of damage done to the property insured; the respondent claiming £1700, whilst the appellants offered to pay £1350, which he declined to accept. He then instituted this action, in order to have the damage payable to him ascertained by ordinary legal process, and was met by the defence that, until he had obtained an award settling its amount, all right of action was excluded by the terms of the policy. In answer to that defence the respondent relies upon the rule of Scotch law which the House had recent occasion to consider in *Tancred, Arrol & Co.* v. *Steel Company of Scotland* (1), according to which a general agreement to refer future differences, if and when they shall arise, to arbiters who are not named, is held not to be binding upon either of the contracting parties. His answer was sustained, and the plea in defence repelled by the Lord Ordinary (Stormonth-Darling), whose decision was unanimously affirmed by four judges of the First Division.

From the note appended to the interlocutor of the Lord Ordinary, and the opinions delivered by the late Lord President (Inglis) and Lord McLaren, in which Lords Adam and Kinnear simply expressed their concurrence, it appears that the appellants' undertaking to indemnify, and the thirteenth condition were treated by their Lordships not as together constituting a stipulation one and indivisible, but as consisting of two independent stipulations, the one imposing an obligation to pay or make good damages resulting from fire, and the other containing an agreement to refer all disputes and differences as to the amount payable. I gather that, even in that view, their Lordships would have been prepared to hold the clause of reference binding if the function of the arbitrators had been limited to the mere estimation of value, and had not extended to the ascertainment of the data upon which their estimate was to be formed, should these data be in dispute. They held that the reference came within the rule, inasmuch as it committed to the decision of the arbitrators, not merely the quantum of damage, but as the Lord President explained (2), questions which might possibly arise "as to whether articles alleged to be destroyed fall within the scope of the policy; or as to whether the articles alleged to be

(1) 15 App. Cas. 125.
(2) 18 Court Sess. Cas. 4th Series (Rettie), at p. 1221.

destroyed were actually in the premises at the time; or as to the value of articles burnt, which could only be got at by an expert, or by some one who knew their intrinsic value." Their judgment went against the appellants, upon the ground apparently that a reference to unnamed arbitrators to put a value upon subjects, as to the identity or original condition of which there is no dispute between the parties, forms the only exception from the rule already referred to.

The first reported case, in which the rule to which effect has thus been given was authoritatively settled by the Court of Session, is that of *Buchanan* v. *Muirhead* (1), which was decided in 1799. The principle of the so-called exception had been recognised by the Court eighty-four years before in *Wallace* v. *His Tacksmen* (2), where a landlord had let heritable subjects, with right to his tenants to obtain an extension of their lease, upon payment of an increase of tack duty to be determined by "two indifferent arbiters, mutually to be chosen by him and his tacksmen." The landlord brought an action of removing, on the ground that under the tack he had the option of resuming possession; but the Court repelled his plea, and found "that the defenders being willing to submit to a further tack duty, and to name an arbiter, the pursuer was also bound to name another."

In my opinion, the distinction between those contracts of submission to arbiters unnamed which have been held to be invalid, and those which the law sustains, is traceable to the fact that, in the first case, the carrying out of the reference is not, whereas, in the second case, it is essential to the constitution of a contractual obligation upon which an action at law can be maintained. The reason assigned for the decision in *Buchanan* v. *Muirhead* (1) was that "supporting such clauses would create a new court;" and in all the cases which have followed on the same point, that has been accepted by the Bench as the real ground of their judgment, although some judges have doubted whether it was satisfactory. On the other hand, where the object of the reference is to ascertain some fact or term which is made essential to the constitution of contract rights or liabilities, it does not raise a proper lis. As Lord Deas said in *Cochrane* v. *Guthrie* (1): "It has long been settled that such a stipulation is effectual. It is not a submission of disputes and differences. It is an agreement that the occurrence of a certain contingency shall be ascertained in a certain way, and in that way only." In the later case of *Howden & Co.* v. *Dobie & Co.* (2) Lord President Inglis observed, "A reference to fix a price, or the conditions of a lease, or any dispute arising as to the execution of a contract, as in *Merry and Cunninghame's Case* (3) are matters which cannot be settled by a Court of Law without assistance. They are not lites."

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(1) Mor. Dict. 14,593.

(2) 5 Brown's Sup. 7.

Had I been able to accept the construction which appears to have been put upon the terms of the policy in the Courts below, I should probably have agreed in their conclusion as to the non-obligatory character of the agreement to refer. But the language of the policy is exceptionally plain and free from ambiguity. The thirteenth condition is incorporated with, and made an integral part of, the obligation of indemnity undertaken by the appellants, and it expressly stipulates that their obligation is not to give rise to any pecuniary liability until the amount of loss or damage payable to the insured has been liquidated by an award. Assuming the Court below to be right in holding that the agreement to refer is not binding in law, and that the respondent has the option of either naming or declining to nominate an arbiter, what would be his position? Upon that point I do not entertain any doubt. If he chose to carry out the reference, the appellants would become his debtors, and he could sue them for the amount of the award whenever it was issued. If he elected to decline, it would, in my opinion, be beyond the competency of the Court to make a new and different contract between these parties by entertaining an ordinary action for assessment of damage, and giving decree against the appellants for a sum which, by the terms of the contract, they are in no event liable to pay. I do not mean to suggest that, if through any act or default of the appellants, such a reference as is

(1) 21 Court Sess. Cas. 2nd Series (Dunlop), at p. 376.

(2) 9 Court Sess. Cas. 4th Series (Rettie), at p. 761.

(3) 21 Court Sess. Cas. 2nd Series (Dunlop), 1337.

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contemplated in the policy had become impossible, the Court could not have given the respondent a remedy by entertaining an action of damages as for breach of agreement, but no such case occurs here.

Upon the question whether a reference like the present, by reason of its possibly devolving upon the arbiters the decision of the matters specified in the passage already cited from the opinion of the Lord President, becomes obnoxious to the charge of invading the jurisdiction of Her Majesty's Courts, the judgment of this House in *Scott* v. *Avery* (1) is a direct authority. No doubt the judgment was given in an English suit; but that circumstance does not detract from its weight, because, until modified by comparatively recent legislation, the law of England went beyond that of Scotland, and held that no agreement to refer future disputes to arbitrators, whether named or not named, could oust the jurisdiction of the Courts or disable either of the contracting parties from resorting to them. In *Scott* v. *Avery* (1) the action was brought by the insured under three maritime policies, each of which contained clauses and conditions with respect to payment of indemnity and the ascertainment of the amount by the award of the arbitrators, substantially the same with those which occur in the policy before us. It was held by the House, affirming the judgment of the Exchequer Chamber, that until an award was made no action was maintainable.

In delivering the judgment of the House, Lord Campbell said (2): "I think that the contract between the shipowner and the underwriters is as clear as the English language could make it; that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties; and upon a deliberate view of the policy, I am of opinion that it embraced not only the assessment of damage, the contemplation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers, as well as the amount to be paid." The noble and learned lord then deals with the question

(1) 5 H. L. C. 811.

(2) 5 H. L. C. at p. 851.

whether such a contract is tainted with illegality, which he answers in the negative, and the main ground of judgment is expressed by him in these terms (1): "Now, in this contract it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any Court whatever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined."

The observations of the noble and learned lord, in so far as they refer to the terms of the contract, are precisely applicable to the contract of insurance between the appellants and the respondent; and in so far as they relate to non-ouster of the Courts' jurisdiction, they appear to me to be in consonance with the principles of Scotch law, as these are illustrated by the decisions cited in the arguments of counsel, which I shall now notice in the order of their dates.

The first of these cases, *Munro* v. *Mackenzie* (2), which was strongly relied on by the appellants' counsel, does not throw much light upon the present controversy. In virtue of powers reserved to him by the lease, the lessor, during its currency, resumed possession and took over the tenant's stock of sheep, for which it was stipulated that he should pay such valuation as might be put upon them by two men mutually chosen. Four years afterwards the tenant brought an action at law for the value of the stock. The Lord Ordinary remitted to a person of skill, selected by himself, to ascertain and report the value of the sheep at the time of delivery. Against that appointment the landlord unsuccessfully reclaimed to the First Division, on the ground that he was entitled, as matter of right, to have the case sent for trial to the Jury Court. The clause of reference was not, and neither party appears to have insisted that it should be, enforced.

Dixon v. *Campbell* (3) is more in point. A lease of coal provided that, in the event of the mineral field becoming "in the opinion of skilful men mutually chosen by the parties, incapable of being wrought to advantage," the tenants should have power to renounce. The First Division, reversing the judgment of the Lord Ordinary, held that the clause of reference continued to be binding, notwithstanding that two arbiters, duly nominated by the parties, had differed in opinion; and, consequently, that the tenants could not maintain an action to have it found and declared that the coal had become unworkable to profit, and that they were entitled to give up the lease.

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(1) 5 H. L. C. at p. 854.

(2) 2 Court Sess. Cas. 1st Series (Shaw), (2nd Ed.), 508.

(3) 8 Court Sess. Cas. 1st Series (Shaw), 970.

In *Smith* v. *Wharton Duff and Others* (1) a lessor resumed possession under a clause in the lease which bound the tenant to remove on being allowed such compensation as should be "ascertained by men mutually chosen for that purpose." Arbiters were mutually nominated, and issued their award. The tenant being dissatisfied with its amount, raised an action against the lessor, concluding for reduction of the award and for payment of £800 as compensation. The award was set aside by the Court, on account of various irregularities; but the Lord Ordinary (Cockburn) assoilized the defender from the petitory conclusion, holding it to be settled law that when such an engagement to refer is incorporated with the contract, so as to form a part of it, the engagement is obligatory. In the First Division his judgment was unanimously affirmed. The Lord President Hope agreed with the reasoning of the Lord Ordinary. Lords Mackenzie and Jeffrey came to the same conclusion, but thought the case was attended with difficulty. Lord Fullerton delivered a very clear opinion in favour of the judgment, observing, "When the reference is essential to liquidate the obligation come under by the party, it is good, though to a person not named. If not, what would become of the obligation? The same learned judge, in *Hendry's Trustees* v. *Renton* (2), stated the rule of law to be that clauses of reference to persons not named are valid, and obligatory in cases where the ascertainment by their means "of a point essential to the extrication of a special stipulation in the contract, is made part of the stipulation itself. As for instance, when parties bind themselves to pay or receive a sum to be fixed by men mutually chosen, or to accept their opinion as the criterion of the existence or non-existence of some contingency on which the obligation of parties is by the contract dependent." The clause of reference in *Hendry's Trustees* v. *Renton* (1) being a general one, and the stipulation which the Court was asked to enforce not being made dependent upon it, was held not to be binding; but I refer to these dicta, because of the effect which was given to them in the next case which I have to notice.

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(1) 5 Court Sess. Cas. 2nd Series (Dunlop), 749.

(2) 13 Court Sess. Cas. 2nd Series (Dunlop), at p. 1007.

The clause which was considered by the Court in *Merry and Cunninghame* v. *Brown* (2), occurred in a mineral lease constituted by an informal missive, and was in these terms: "Should the minerals become exhausted, or workable only at an evident loss, the tenants shall be entitled to give up the lease on the same being ascertained by arbiters mutually chosen." The tenants brought an action to have it declared that the lessor was bound not only to name an arbiter, but also to concur in naming an oversman, or in giving the arbiters power to appoint one in the event of their differing in opinion; and in the event of the question not being so determined, to have it declared by the Court that the minerals were unworkable to profit, and that they had the right to renounce the lease. The Lord Ordinary (Benholme) found that the parties were bound to refer to two arbiters, as provided in the missive lease, and assoilized the defender. In the Inner House, where the judgment of the Lord Ordinary was substantially adhered to, a question arose upon the construction of the missive as to the true character of the clause of reference, and upon that point there was a difference of opinion. Lords Wood, Cowan, and Benholme held that the reference was so incorporated with the power of renunciation that they formed one stipulation, whilst the late Lord Justice General (then Lord Justice Clerk) was of opinion that the ascertainment of the fact of unworkability to profit, by means of arbitration, was not made a condition precedent of the tenant's right to renounce. But all the learned Judges, the Lord Justice Clerk included, expressed their approval of the law laid down by Lord Fullerton in *Smith* v. *Wharton Duff and Others* (3), and *Hendry's Trustees* v. *Renton* (1).

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(1) 13 Court Sess. Cas. 2nd Series (Dunlop), 1001.

(2) 21 Court Sess. Cas. 2nd Series (Dunlop), 1337.

(3) 5 Court Sess. Cas. 2nd Series (Dunlop), 749.

The principle of law followed by the First Division of the Court of Session in *Dixon* v. *Campbell* (1), and *Smith* v. *Wharton Duff and Others* (2), and by the Second Division in *Merry and Cunninghame* v. *Brown* (3), appears to me to be practically the same with that which was adopted by this House in *Scott* v. *Avery* (4). I can find no authority in any Scotch decision for limiting the application of the principle to cases in which the sole duty of the arbiters is to value an existing thing, the identity of which is admitted, and which they can inspect for themselves, or to forming an estimate of value upon facts admitted, or otherwise ascertained. It is seldom possible for arbiters, who have to decide whether a mineral field has become unworkable to profit, to determine the question by personal examination. In order to form an estimate, they must know approximately how much mineral has been worked out, how much remains to be worked out, and the probable cost of bringing it to the surface. These are matters which can, in very few cases, be ascertained by inspection. In *Cochrane* v. *Guthrie* (5), Lord Deas said, in reference to the functions committed to an arbiter in cases of that kind: "I have no idea that men of skill are not entitled to investigate in all cases so far as necessary to enable them to form their opinion. They may take evidence if they wish it; or they may go to the spot and use only their own eyes if they find this sufficient. In short, they are entitled to do whatever is necessary to enable them to make up their minds." In the opinion thus expressed I entirely concur.

In this case Lord M'Laren refers for the grounds of his judgment to *Ramsay* v. *Strain* (6), where his Lordship, sitting in the Second Division, with Lords Young and Rutherfurd Clark, delivered the leading opinion. In that case, a disposition of coal, dated in 1788, laid an obligation upon the disponees to pay damages done to the surface by their workings, "as the same shall be ascertained by neutral persons, to be mutually chosen."

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(1) 8 Court Sess. Cas. 1st Series (Shaw), 970.

(2) 5 Court Sess. Cas. 2nd Series, (Dunlop), 749.

(3) 21 Court Sess. Cas. 2nd Series (Dunlop), 1337.

(4) 5 H. L. C. 811.

(5) 21 Court Sess. Cas. 2nd Series (Dunlop), at p. 376.

(6) 11 Court Sess. Cas. 4th Series (Rettie), 527.

In the year 1883 the then owner of the surface brought an action against the then coalowner, who not only pleaded that the action was excluded by the clause of reference, but also (1.) that the pursuer was not in titulo to maintain the claim, and (2.) that it was barred by previous settlements and discharges. To my mind, it seems clear that it was not in the contemplation of the parties who contracted in 1788 to submit either of these two prejudicial pleas to the decision of the arbiters. The Lord Ordinary found that the action was excluded by the clause of reference, and the pursuer having reclaimed, the Inner House recalled his interlocutor, and remitted the case to him. I cannot regard that as a precedent which can govern the present case, because there were pleas stated, proper for the determination of the Court, before any question could arise as to the manner in which the amount of damage fell to be ascertained; and I am confirmed in that view by the fact that Lord Young, one of the two judges who concurred in Lord M'Laren's opinion expressly stated, without contradiction either by Lord Rutherfurd Clark or Lord M'Laren, that the Court was not deciding "anything just now as to whether, after the Lord Ordinary has had a proof on the question of liability, there should be a reference as to the amount of damage." Subject to that explanation, the decision was, in my opinion, perfectly right. If, on the contrary, it was intended to settle the question raised in this appeal, I should have no hesitation in holding that it was wrong.

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[illegible]

Lord Watson.

For these reasons, I am of opinion that the judgments appealed from ought to be reversed, and that the appellants ought to have absolvitor.

Lord Ashbourne :—

My Lords, I have had an opportunity of reading and considering the opinion which has just been addressed to your Lordships by my noble and learned friend near me (Lord Watson), and I only desire to express my entire concurrence in the conclusion at which he has arrived.

My noble and learned friend, Lord Morris, who is unavoidably absent to-day, has requested me to state his concurrence in the conclusion at which your Lordships unanimously arrive.

Lord Field:—

My Lords, the contract which your Lordships are called upon to construe in this appeal is the familiar one of fire insurance, and is made in the familiar form of a "policy" under the company's seal containing on the face the consideration for and the promise to pay for loss or damage by fire, and on the back the conditions on which the contract is based, and which are, by the very terms of the policy, "to be taken as part of it." Although, however, the instrument wears the appearance at first sight of two contracts, one to pay or compensate the assured for his loss or damage, leaving the amount to be ascertained in case of difference in the ordinary way, and the other an independent contract to refer any such difference to unnamed arbiters, yet in truth the language of the policy which I have referred to makes the 13th condition, which is the only one to which it is necessary to refer, a very part of the policy, the result being that there are not two contracts to any extent independent of each other, but only one contract, which may be thus generally expressed as a contract to pay only such amount as shall be ascertained by the arbiters to be named in the manner provided by the condition. This appears to me to be the plain construction of the contract and the reasoning which induced this House to give a similar construction to the mutual policy under consideration in the case of *Scott* v. *Avery* (1), referred to by my noble and learned friends, fortifies me in coming to that conclusion.

If, then, the parties to the contract have, for obvious motives of convenience, agreed to substitute (except in case of the allegation of fraud or non-compliance with condition precedent) for the ordinary tribunal, a tribunal which from its composition may consist of persons competent by their experience to deal with the questions which ordinarily arise when the value of destroyed or injured property has to be ascertained, and by their freedom of movement able to investigate upon the very spot the necessary condition, does the law of Scotland on the ground of general public interest, refuse to enforce this contract which the parties have so made for themselves? My Lords, the authorities which have been so exhaustively dealt with by my noble and learned friend, Lord Watson, satisfy me of the contrary; and I think, therefore, that your Lordships should give effect to the contract by adopting the motion now made.

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(1) 5 H. L. C. 811.

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As to costs,

Sir *Horace Davey*:—

The appellants are willing, to put an end to the matter, to accept the amount fixed by the Courts as if it had been found by arbiters; but they ought to have the costs of the action up to and including the first interlocutor, and also the costs of this appeal, reserving (that they may be dealt with at some future time) the costs of the inquiry rendered necessary in consequence of the first interlocutor not having been brought up to this House.

Pymar, for the respondent:—

If the appellants had paid the £1500 at first, there would have been no litigation at all.

LORD HERSCHELL, L.C.:—

It is better to reserve the question of costs altogether.

Ordered, That the interlocutors of the 23*rd of June, the* 18*th of July, the* 16*th and* 23*rd of October, and the* 2*nd of December*, 1891, *and the* 9*th of March*, 1892, *complained of, be reversed. Further ordered, That the cause be remitted back to the First Division of the Court of Session in Scotland, with directions to assoilzie the defenders (appellants) from the conclusion of the action. Further ordered, That the question of costs be reserved* (1) *for the further consideration of this House.*

Lords' Journals, 16th Dec. 1892.

Agents for the appellants: *Lock & Goodhart, for T. & R. B. Ranken, W. S. Edinburgh.*

Agents for the respondent: *Clulow & Gould, for Thomas M'Naught, S. S. C. Edinburgh.*

(1) The question of costs was subsequently arranged between the parties.

[PRIVY COUNCIL.]

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July 26, 27, 28, 29; Aug. 2, 3; Nov. 19.

LABRADOR COMPANY . . . . DEFENDANTS;

AND

THE QUEEN . . . . PLAINTIFF.

AND THE CROSS-APPEAL.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Action of Ejectment—Effect of Act (18 *Vict. c.* 3) *as to Defendants' title—Prescription—Immemorial Possession—Disclosure of Title with its Infirmities.*

In an action of ejectment by the Crown, it appeared that the appellant company derived title through a grant made in 1661 by the French Government, which gave no seigneurie over the land in suit, but only a right to make establishments for hunting and fishing within certain limits; that an Ordonnance in 1733, together with the action of the French Crown thereunder, did not create or recognise any title in the heirs of the grantee to such seigneurie; that down to 1854 there was no evidence of either its creation or recognition by the British Crown; but that in 1854 the Canadian Act, 18 Vict. c. 3 (amended by subsequent Acts), recognised that there was a seigneurie of Mingan, being part of the disputed land the boundaries whereof were conclusively established by a schedule authorized by the Acts:—

Held, that the High Court was right in dismissing the suit as regards the scheduled lands. If a mistake had been made the legislature alone could correct it; a court of law must give effect to the enactment as it stands:

Held, further, with regard to the claim of the company to hold the whole of the land in suit by prescription and immemorial possession, that inasmuch as it had disclosed the true root of its title, the law of prescription did not apply.

CONSOLIDATED CROSS-APPEALS from a decree of the Court of Queen's Bench (Feb. 6, 1891), affirming by a majority a decree of the Superior Court (Sept. 18, 1888).

The question at issue was as to the title of the Crown to a large tract of territory within the Province of Quebec, forming the northern sea coast of the Gulf of St. Lawrence and extending from Cape Cormorant at the mouth of the River St. Lawrence to the eastern boundary of the province near Brador Bay by Bell Isle Straits. The tract of land in dispute is about 450 miles long, and is of a uniform width throughout of six miles inland from the sea coast.

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* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and LORD HANNEN.

The facts and proceedings are stated in the judgment of their Lordships.

The Judge of the Superior Court decided that the company had satisfactorily proved the grant of the seigneurie in question; that they had not surrendered any portion of it except the district from the Île aux Œufs to the River Moisy in the proceedings in 1733, and that the result of such proceedings left the rights of the predecessors of the company untouched except in respect of the district surrendered. He further decided that the company and their predecessors in title had been in practically undisturbed possession of the seigneurie for more than two centuries, that there had repeatedly been a recognition of the rights of their predecessors by the Crown, both in the Maurepas correspondence, by the receipt of dues, which were only owing to the Crown on the hypothesis that a seigneurie existed, and finally by the schedule of 1864. He left open and undecided the point raised by the company that their immemorial possession and their possession for over 100 years amounted to a title. But while thus in favour of the company on the main point, that of the existence of the seigneurie, the judge was in favour of the Crown as to what constituted its eastern boundary.

The Court of Queen's Bench affirmed the judgment of the Superior Court, but solely upon the ground that the Crown was bound by the recognition of the existence of the seigneurie contained in the seigneurial Acts, and that as against the company the schedule of 1864 was binding as to the eastern boundary of the seigneurie.

Rigby, Q.C., *Abbott*, Q.C. (of the Canadian Bar), and *Tyrrell T. Paine*, for the Labrador Company, contended that the Courts below were right, so far as they held upon the evidence that the company had proved the existence of the seigneurie in question. They referred to the evidence as shewing an original grant thereof by the French Government to the appellant's predecessor—a subsequent recognition of its existence first by the French and afterwards by the British authorities, and that the rights thereunder, so far as they were asserted in the present suit, had not been surrendered.

With regard to the points of law involved, they contended that the majority of the Court of Queen's Bench were right in holding that the statutory recognition of the existence of the seigneurie, by the Acts of 1854, 1855, and 1856, related to the terra firma of Mingan, and bound the Crown. The error was in holding that the schedule of 1864 definitely settled the question of the eastern boundary. In the case of an unsettled seigneurie, which the terra firma of Mingan was, such schedule had no effect whatever except to fix the amount of the difference in value of the dues occasioned by the change from seigneurial tenure to that of franc aleu roturier.

Two classes of seigneuries are dealt with by the Acts, settled and unsettled; in other words, seigneuries in which there had been subinfeudation, and those in which there had not. In regard to settled seigneuries it would be necessary to ascertain the difference in value of the dues not only between the Crown and the seignior, but also as between the seigneur and his censitaires, to whom the land was conceded and by whom it was settled (see sect. 7, sub-sect. 4, of the Consolidated Statutes of 1861, c. 41). A "censitaire" is defined by sect. 8 to be "every person occupying or possessing any land in any seigneurie with the permission of the seigneur or from whom the seigneur has received rents or other seigneurial dues in respect of such lands." In the case of lands held by censitaires, but only in such case, the Commissioners were directed to ascertain the extent and nature of the lands held by them (see sect. 7, sub-sect. 5). No such direction was given in the case of seigneuries: indeed it was by sect. 9 expressly enacted that for the purpose "of making the schedule of any seigneurie the boundaries thereof shall be deemed to be those actually possessed by the seigneur although all or any part thereof may be in dispute." Neither as between seigneur and censitaire, nor as between Crown and seigneur, nor as between seigneur and adjoining seigneur, was any jurisdiction as to boundaries given to the Commissioners, and it is expressly stated in sect. 9 that for the purpose of making the schedule of any seigneurie "the boundaries" of a seigneurie are to "be deemed to be those actually possessed by the seigneur although all or any part thereof may be in dispute."

Further than that, as regards unsettled seigneuries, the change of tenure was effected eo instanti by the passing of the Act of 1856, and there was no necessity for settling boundaries by a subsequent schedule. Consequently, those who prepared the schedule of 1864 acted without jurisdiction in fixing the eastern boundary of Mingan at the River Goynish, and disregarded the direction of the Act to adopt the boundaries actually possessed by the proprietors; and a schedule so drawn is not binding on the appellants. [LORD WATSON:—How can a court of law go behind what has been done by the Legislature?]

It was also contended that the company and its predecessors in title had been in possession, in good faith, for more than 100 years, of the lands in suit, with the knowledge of, and without the interference of, the Crown. Such possession is equivalent to, or is sufficient evidence of, a title even against the Crown; especially in the case of wild and unsettled lands, which under the feudal law were alienable, although forming part of the domain of the Crown. Such possession is evidence of a grant by the Crown of the whole of the property in dispute. [LORD WATSON:—Is there any evidence of possession which is inconsistent with a licence? Can you use possession for any other purpose than to explain the original grant? Can you prescribe contrary to the title which you produce and rely on?] The authorities cited upon the question of prescription were the Edit de Moulins de Février, 1566; Bosquet, vol. ii. pp. 90 and 96 (2nd ed. pp. 112 and 120); Bacquet, Troisiesme Traicté, partie iii.; Du Droit de Déshérence, ed. 1664, p. 170, ch. 7, No. 8, and p. 177; Bourjon, Droit Commun de la France, vol. i. p. 183, ed. 1770, pt. i. sect. 2, ss. 23 and 24; Tit. iii. chap. prélim. sect. 1, ss. 3, 4, and 5; Tit. xii. c. 4, s. 3, p. 1093. Dalloz, Jurisprudence, 1838: première partie, Cour de Cassation, p. 166; ditto, 1849, deuxième partie, Cour d'Appel, p. 149; Pothier's Works, ed. 1827, par Dupin, vol. viii. pp. 517, 534, sects. 278–284, 288; Hervé, ed.

1785, Théorie des Matières Féodales et Censuelles, vol. i. pp. 335, 397, which is an authority that there may be prescription of a seigneurie against the Crown; 5 Guyot, Tr. des Fiefs, p. 5, citing Dumoulin, vo. Dénombrement, sect. 7, N. 24; and 5 Guyot, c. 7, p. 157. See also sect. 2213 of the Civil Code, on which it may be said that a prescriptive censitaire is not covered by it, and also that prescription, having begun to run while the old law was in force, was governed thereby.

Sir *Horace Davey*, Q.C., *Laflamme*, Q.C., and *Belleau*, Q.C. (both of the Canadian Bar), and *Gore*, for the Crown, contended that under the grant of 1661, the company's predecessors did not derive title to any territory upon the mainland, but only a right to establish stations thereon within the limits and for the purpose stated therein. The effect of the judgment in 1733 was that the grant was held not to be binding on the Crown, and in the proceedings the grantee surrendered to the French Crown all claims thereunder. Upon the cession of French Canada to England the claims of the grantee were considered and rejected, and nothing has happened since to preclude the present claim of the Crown. The evidence entirely negatives any possession or occupation of the lands in dispute except for the limited purposes mentioned in the grant. Nor were there any acts of ownership exercised by the appellants' predecessors which were not referable to the terms of the grant.

As regards the two points of law raised by the appellants, it was contended, first, that no title to any part of the territory in dispute had been obtained under the Act of 1856 and the schedule of 1864. Reference was made to the three Acts of 1854, 1855, and 1856, and to c. 41 of the Consolidated Statutes, 1861, which consolidated them. In the Act of 1856 there was nothing to shew what seigneurie was referred to in sect. 10 under the name of Mingan. At that time the seigneurie of the mainland of Mingan had, as was held by all the judges of the Court of Appeal, no existence. The only seigneurie known by that name was that of the Isles of Mingan, which latter seigneurie had never been settled or conceded, and, therefore, did not come within the terms of sect. 10. The evidence shewed that the schedule had been prepared by the chief clerk to the Commissioners, who acted on erroneous information, and had been signed by the Commissioners without any steps being taken to verify either the title or extent of the seigneurie. Neither the Crown nor any of the parties interested had any notice of the contents of the schedule nor any opportunity of being heard before it was published. An erroneous statement in an Act, a reference to a non-existing state of things, does not give existence thereto, unless it appears from some part of the Act that the object was to settle the point in a particular way. Reference was made to Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 6, to Schedule A, where Gateshead is mentioned. But in *Rex* v. *Greene* (1), it was held that Gateshead was not a municipal corporation, and that its mention in the schedule was a mistake. See also *Rex* v. *Haughton* (2). The Act cannot create a seigneurie contrary to the fact, there not being any intention so to do.

With regard to the other point, viz., the claim of title by prescription or immemorial possession, it was contended that no title as against the Crown could be acquired in that way. Art. 2213 of the Code is not new; see Pothier, Bugnet's ed. vol. 9, pp. 416, 421, sects. 278-288. See also art. 2208 of the Civil Code, according to which no one can prescribe against his title. The title relied upon by the company binds it, and cannot be altered by any length of possession under it unless it is shewn that acts were done with the intention of altering the rights as conferred by the grant. Reference was made to Dunod, Traité de Prescription, part i., c. 8; Merlin's Répertoire, Title Prescription, vol. 24, pp. 142, 145. The title explains the possession; the quality of the latter will not be changed in the absence of a clear proof of intention so to do: Troplong, Prescription, vol. ii., p. 47. The title adduced by the defendants being manifestly insufficient, no new title has been created either by possession or by recognition by the Crown. Reference was also made to art. 2203 of the Civil Code, which specifies numerous restrictions upon the power of prescribing.

Rigby, Q.C., replied.

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(1) 6 Ad. & E. 548.

(2) 1 E. & B. 501, 515.

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LABRADOR COMPANY
v.
THE QUEEN.

1892. Nov. 19. The judgment of their Lordships was delivered by

LORD HANNEN :—

The subject-matter of these appeals is a tract of country on the northern shore of the Gulf of the St. Lawrence, extending from Cape Cormorant to the Strait of Belle Isle, a distance of more than 400 miles, with a depth of six miles.

The Labrador Company is in possession of this territory. The Attorney-General for the province of Quebec, on behalf of Her Majesty, seeks to recover it from the company, who claim title to the whole of the land in question under a grant alleged to have been made in 1661 to one François Bissot by "the Company of New France," deriving its powers from the Crown of France. The Labrador Company also claimed a title by prescription and immemorial possession. In answer to this claim the Attorney-General denies that the alleged grant of 1661 gave a title to the land in question, or that a title by prescription can be acquired against the Crown. He also alleges that the grant to Bissot was revoked by the French Crown and abandoned by Bissot's successors in title. The company further rely on certain alleged acts of recognition by the Crown, which they contend preclude the Crown from setting up the said revocation and abandonment of the grant, or from denying its validity.

The judgment of the Superior Court affirmed the title of the Crown to the larger portion (about 250 miles) of the tract in dispute, leaving the company in possession of the rest. The River Agwanus or Goynish was taken as the dividing line, the Crown recovering all that lies to the east of that river, and the company keeping all that lies to the west.

Both parties appealed from the judgment, and the Court of Queen's Bench dismissed both appeals.

The basis of the company's claim is the alleged grant of the 25th of February, 1661. It is necessary therefore, in the first place, to examine the nature and extent of this grant. In 1627 a company, called the Company of New France (or of the Cent Associés) was formed, to which the King of France conceded the pays de la Nouvelle France, including the land in question, "en toute propriété, justice et seigneurie," with the right to distribute the lands. The rights of this company were subsequently surrendered to the king, and by him ceded to a fresh company, called "the Company of the West Indies;" but in 1661, while the Company of New France retained its original powers, it made, on the 25th of February of that year, a grant to François Bissot, under whom the Labrador Company claim as successors in title.

This grant is no longer in existence, the original document, as well as the copy supplied to Bissot, having been destroyed by fire. Before their destruction, however, François Bissot, on the 11th of February, 1668, made an aveu, or declaration, to the Company of the West Indies, the successors of the Company of New France, setting forth the grant made to him by the last-named company in 1661. This aveu has been preserved, and it has been treated throughout these proceedings as containing a correct statement of the original grant.

This aveu is in the following terms:—

"François Bissot, Sr. de la Rivière, lequel avoue et déclare tenir de nos Seigneurs l'Isle aux Œufs, située au dessous de Tadoussac, vers les Montpellès, du costé du Nord, quarante lieues ou environ dud. Tadoussac, avec le droit et faculté de chasse et d'établir en terre ferme aux endroits qu'il trouvera plus commodes, la pesche sédentaire des loups marins, baleines, marsouins, et les autres négoces, depuis la dite Isle aux Œufs jusqu'aux Sept Isles et dans la Grande Anse, vers les Esquimaux où les Espagnols font ordinairement la pesche, avec les bois et terres nécessaires pour faire le dit établissement. Le tout à luy appartenant par titre de concession en date du vingt cinq Février mil six cent soixante et un, signé par extrait des délibérations de la Compagnie de la Nouvelle France, A. Chefault, à la charge de payer par chacun an, deux castors d'hyver ou dix livres tournois au receveur de la dite Compagnie, et les droits accoutumés pour la traite à la communauté de ce pays, au bas duquel titre est écrit Dubois Danaugour, ratiffié le don que dessus de laquelle dite déclaration il nous a requis acte et a signé. Ainsi signé, Bissot, avec paraphe.

"Sur quoy, oüy le procureur fiscal, nous avons accordé acte au

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dit sieur Bissot de son dit aveu et déclaration, et iceley condamné payer la dite redevance, tant pour le passé que pour ladvenir, suivant et conformément au dit titre de concession, sans néantmoins que le dit acte puisse être tiré à conséquence n'y préjudice, remettant au Roy ou à la Compagnie de faire valoir le dit titre ou point. Mandons, &c.

"Donné par nous Louis Théandre Chartier, Escuyer, Seigneur de Lotbinière, Conseiller du Roy, Lieutenant-Général Civil et Criminel, à Québec, les assizes tenant le onzième jour de Février mil six cent soixante-huit."

It is not disputed that this concession gave to Bissot the seigneurie of the Isle aux Œufs, situated some distance to the west of Cape Cormorant, the western boundary of the land now in question. The contest arises on the passage commencing "Avec le droit et faculté de chasse, &c."

For the Crown it is contended that the effect of the grant is to give the seigneurie of the Isle aux Œufs, with the accessory right of hunting, &c., on the mainland within certain limits, the extent of which will be considered later. The company, on the other hand, contend that this grant gave a seigneurie, not only in the Isle aux Œufs, but in the territory on the mainland within the defined limits.

Their Lordships are of opinion that this contention of the company is wholly untenable. They agree on this point with the opinion expressed by all the judges in the Courts below, that the rights to be exercised on the mainland are only accessory to the seigneurie of the island. They consist in the permission (not to take possession of a defined district on the mainland, but) to establish at such places as may be most convenient, fixed stations for the capture of seals, &c., with the privilege of taking the timber and land necessary for the establishment of such stations. This last-mentioned provision effectually excludes the idea that the whole land was conceded to Bissot in fee, in which case it would have been superfluous to give him the right to take the wood and land necessary for the stations. Further, the reservation of an annual payment of two beaver skins for the right to hunt and fish is stated by Sir A. A. Dorion, C.J., in the judgment of himself and his colleagues, to be inconsistent with the hypothesis that a fief on the mainland was granted, and this appears also to have been the opinion of Routhier, J., and it has not been controverted before this board.

One fact remains to be noticed, tending strongly to negative the company's contention that a seigneurie on the mainland was conceded by the grant of 1661. That document contains no limitation inland of the supposed fief. It might, therefore, as well have been made the basis of a claim to the whole territory northwards, forming part of La Nouvelle France, as to the land for six miles inland. A license to make stations for fishing and hunting, and trading with the natives in an unsettled country, might naturally be given without fixing its limits inland; but it cannot be supposed that a fief would be created without some indication of what its boundaries were to be.

This leads to the consideration of the question, over what extent of territory on the mainland is the right of establishing stations for fishing, &c., conceded? It is thus defined: "Depuis la dite Isle aux Œufs jusqu'aux Sept Isles, et dans la Grande Anse, vers les Esquimaux où les Espagnols font ordinairement la pesche;" that is, "from the said Isle aux Œufs, up to the Seven Islands, and in the great cove in the direction of the Esquimaux where the Spaniards usually fish." In English there can be no doubt this means that the fishing stations may be established in the land between the Isle aux Œufs and the Seven Islands, and also in the Grande Anse. It has, however, been contended that the proper construction of the French is different, and that the force of the word "jusque" is carried on to the word "dans," and that the passage has the same meaning as if it had run "jusqu'aux Sept Isles et jusque dans la Grande Anse." No authority for this construction has been given, and all the judges of the Court below, whose mother-tongue is French, agree that the right of establishing a station in the Grande Anse is distinct from the right to make stations up to the Sept Isles. Routhier, J., says: "Ces derniers mots comprennaient-ils toute la terre ferme depuis les Sept Isles jusqu'à la Grande Anse? Je ne le crois pas, car autrement on aurait fixé l'étendue de la concession depuis l'Isle aux Œufs jusque dans la Grande Anse." And Dorion, C.J., thus paraphrases

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the grant: "Que la concession était de l'Isle aux Œufs en seigneurie, et de plus le droit de faire des établissements de pêche et de chasse sur la côte Nord jusqu'aux Sept Isles, puis dans la Grande Anse vers les Esquimaux." Their Lordships have no doubt that this is the correct interpretation of the grant, and that it conceded to Bissot no seigneurie on the mainland, but only a right to make establishments for fishing and hunting up to Sept Isles, and also in the Grande Anse. Where that Grande Anse was situated will be considered hereafter.

It may be convenient at this point to refer, in order of date, to a map of 1678, which has been relied on as shewing that a seigneurie on the mainland was recognised as belonging to Bissot. This map is described as one "pour servir à l'éclaircissement du papier terrier de la Nouvelle France," and was dedicated to the Minister Colbert by the Intendant Duchesneau. Upon this map is printed "Seigneurie du Sieur Bissot," stretching along the coast from a little east of the Sept Isles to a place about two-thirds along the "Isles de Mingan." These islands follow another to a river along which is written "Esquimaux," and at a short distance eastward "Baye des Espagnols" is inscribed.

The bearing of this map on the question of boundary will, so far as is necessary, be referred to by-and-by. Its value as evidence of a seigneurie on the mainland is now the subject of consideration. The utmost effect that could be given to this map would be as evidence of reputation at the date it bears of the existence of such seigneurie; but this must necessarily give way before the proof which the representatives of Bissot have supplied that this grant to him did not in fact concede a seigneurie on the mainland. But undue importance has been given to this inscription on the map. Bissot had, in fact, a seigneurie, namely, that of the Isle aux Œufs, to which belonged as an accessory a right of making establishments for hunting, fishing, &c., on the mainland. It was not necessary for the purpose of the chartographer that all this should be set out on the map. What was of importance to him was, to indicate over what extent of coast Bissot exercised rights whatever they might be, and he did this by writing the words referred to. This interpretation is indeed impliedly adopted by Routhier, J., who is most favourable to the contention of the Labrador Company. He says, speaking of the right of continuing the establishment of Mingan, "Comme cette exploitation était un accessoire de l'ancienne seigneurie de l'Île aux Œufs, il n'est pas étonnant que depuis des temps reculés on l'ait appelée seigneurie du sieur Bissot."

But it is contended, on behalf of the Labrador Company, that, even if the grant of 1661 did not in itself create a seigneurie on the mainland in favour of Bissot, this effect was produced by an Ordonnance of Intendant Hocquart in 1733, and the subsequent action upon it by the French Crown.

This Ordonnance was pronounced in a suit instituted in 1732 by Pierre Carlier, the Adjudicataire Général des Fermes Unies de France, et du Domaine d'occident, against the heirs of François Bissot (who had died in 1676), and the heirs of Sieurs Lalande and Louis Jolyet, to whom the seigneuries of the isles and islets of Mingan had been granted by the French Crown in 1679, calling upon them to shew by virtue of what title they had taken possession of the territory occupied by them on the terre du nord (i.e., the mainland north of the St. Lawrence) below the River Moisy up to the Bay of the Spaniards.

The Adjudicataire Général did not dispute the title of Jolyet (deceased) to the Isles of Mingan, described in the grant of 1679, as the "Islets du Mingan du côté du nord et qui se suivent jusqu'à l'ance des Espagnols." He only required the title to anything claimed on the mainland. The seigneurie of the isles and islets of Mingan will therefore only be of importance in considering the question of boundary.

In answer to the demand of the Adjudicataire Général, the Defendants relied solely on the grant of 1661, under which they alleged they had formed establishments and had continual possession for seventy-one years, and they conclude by a specific claim to be maintained in the possession and enjoyment of the lands granted to François Bissot, deceased, "in accordance with the title of concession of the 25th of February, 1661."

In reply the Adjudicataire Général, after taking the objection, not now insisted on, that the grant of 1661 was in conflict with certain earlier grants, said that, admitting the grant of 1661 and the declaration of 1668 as valid title-deeds, and construing them in the sense most favourable to the defendants, the grant gave no proprietary title except on the Isle aux Œufs. On the mainland it conferred no right of ownership, but only the right to establish there "la pesche sédentaire," from l'Isle aux Œufs, up to the Seven Isles and in the Bay of the Spaniards, "a right," he continues, "which it would have been useless to express, if the intention of the concession had been to give a right of property, and which by its expression positively excludes a right of property." He then presents substantially the arguments against the then defendants' claim which have been repeated before this Board, and he proceeds: "Though the defendants have not even the right to make establishments in the tract of country from the Seven Islands up to the Bay of the Spaniards, it is in consequence of their title of concession that Bissot, deceased, has founded the establishment of Mingan continued by the defendants, for which they allege a continued possession of seventy-one years. Having regard to this long enjoyment of the seigneurie of Mingan, he will not dispute it, provided that they be limited to a concession of which the limits shall be certain and determined, so that they cannot injure or prejudice the 'Traites du Domaine du Roi.' It is at Mingan that they have fixed their establishment on the mainland. The Farmer-General will not offer opposition to the enjoyment of it being continued to them, and even that the property in it be accorded to them by a new title, if His Majesty should think fit to accord to them as recompense the establishments which they have made there." The Mingan here referred to as the place where the defendants are said to have fixed their establishment on the mainland is a station on the mainland opposite to the islands of Mingan, and is marked on several maps as the Mingan settlement.

The Adjudicataire Général concludes by demanding that he be maintained in his right, to the exclusion of all others, to exercise trading, hunting, fishing, and commerce in the tract of the domaine between l'Isle aux Coudres up to and including the River Moisy, that the defendants be condemned to pay him the

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arrears of the annual dues of two beaver skins or ten livres tournois from 1661 to the then present year, unless they should prefer to give up (se désister de) the said concession, and consent to the reunion to the domaine of the said seigneurie of the Isle aux Œufs, which they long since abandoned, and, moreover, also to pay the dues for the trading which they had carried on at Mingan; and that the said defendants be bound to take a new title for the establishment made by them at Mingan aforesaid, to commence from Cormorant Point ("en allant") in the direction of the Bay of the Spaniards, with such depth and on (payment of) such dues as it should please His Majesty to accord them.

By way of rejoinder to the reply of the Adjudicataire Général, the defendants reassert in general terms their claims, and ask whether their possession for seventy years, and the expenses they have been put to, and the losses they have suffered from the English in times of war, ought not to serve them in the place of title, and they conclude that, though they have proved their right, they consent to the River Moisy being the western limit of their concession up to the Bay of the Spaniards, and, therefore, they pray that they may be relieved from the payment of the dues with which that territory is charged, and that they may be given a new title to it.

This was the state of the controversy which the Intendant Hocquart had to decide. After reviewing the pleadings, Monsieur Hocquart gave his judgment as follows:—

He took notice of the abandonment by the defendants of the territory conceded to François Bissot, deceased, by the Company of Nouvelle France on the 25th of February, 1661, from the Isle aux Œufs up to the River Moisy, and, in consequence, as far as was necessary, reunited to the domain of His Majesty the said territory conceded to the said François Bissot from and including the Isle aux Œufs to Cormorant Point, four or five leagues below the River Moisy; forbade the defendants and all others directly or indirectly to exercise any trading, hunting, fishing, commerce, or establishment in the territory so reunited, or in the said River Moisy and its affluent lakes and rivers; and, in consideration of the abandonment aforesaid by the defendants, he discharged them from any arrears which might be due from them, and "as to the new title of concession required by them for the establishment made by them and their predecessor François Bissot at the place of Mingan aforesaid, the parties shall apply to His Majesty to obtain the same, with such frontage and depth and on payment of such dues as His Majesty shall be pleased to grant."

The effect of this Ordonnance was entirely to put an end to the seigneurie in the Isle aux Œufs, and to the rights, whatever they were, which had been conceded to Bissot by the original grant, as far as Cormorant Point, and to reannex the district from and including the said Isle aux Œufs up to Cormorant Point to the domain of the King. This, with the remission of the arrears, was the whole operative part of the Ordonnance. As to the request of the defendants that the limits of their concession should be from the River Moisy to the Bay of the Spaniards, and that of this district a new title should be granted to them, this was not acceded to. The district for five or six leagues eastward of the River Moisy was reunited to the Crown, and no mention whatever of the Bay of the Spaniards is made, and the defendants are remitted to the Crown to obtain a new title for "the establishment made by them and the said François Bissot, at the place of Mingan aforesaid," for such frontage and depth as His Majesty might think fit to grant.

François Bissot, the son, addressed several petitions for a new title to the Comte de Maurepas, the French Secretary of State. In these petitions he set out the substance of the original grant of 1661, explained that his father had made his first establishment at Mingan, where the family residence was formed, but that he had made many others at different places, which, after they had been destroyed by the English, had been from time to time re-established. He stated that the limits of the Royal domain had been fixed by Hocquart at Cormorant Point, and he prayed that he might be continued in the remainder of his concession from that point "down the river to the conceded lands" (by which appears to be meant, conceded to other persons), and the exclusive privilege of continuing there his establishments, and others, if possible, for the hunting of seals, with the rights of hunting and trading with the savages such as he and his late father had enjoyed for seventy years.

The result of a correspondence which followed between the Comte de Maurepas and the Marquis de Beauharnois, the Governor of La Nouvelle France, and the Intendant Hocquart, was that the Comte de Maurepas stated, in a letter to MM. de Beauharnois and Hocquart, that the circumstances of the case would have determined him to propose to the King to confirm the heirs of Bissot in the possession of a part of the coast conceded by the grant of 1661, and to fix their condition; but that, having regard to the existing circumstances of the family, and the discussions which such a confirmation might give rise to, he had taken the course recommended by MM. de Beauharnois and Hocquart, to suspend all determination on the subject, and that he had only induced the King to agree that the heirs (of Bissot) should enjoy such extent of coast as they (Beauharnois and Hocquart) had designated in their letter, from the boundary of Tadoussac down the river to the concession of the Sieur Lafontaine, with such depth as they (Beauharnois and Hocquart) should think right to fix; and he concluded with a request that they would consider whether it would be convenient to leave them this extent of territory, or whether it would not be right to reduce it for the purpose of locating other concessionaries.

It does not appear that these suggestions of M. de Maurepas were ever communicated to the heirs of Bissot. No new title was ever granted to them. This letter imports no engagement on the part of the Crown to give one; it contains only the expression of a possible intention to do so if, upon the examination of this matter by MM. Beauharnois and Hocquart, it should be thought expedient. No further action on the subject is shewn. No boundary inland was ever fixed. All that can be inferred is that the representatives of Bissot continued to carry on their stations for fishing, &c., at Mingan as before. Their Lordships, therefore, are of opinion that the judgment of Hocquart and the action of the French Crown upon it did not create or recognise any title in the heirs of Bissot to a seigneurie on the mainland.

Nothing between the date of M. de Maurepas' letter, down to the cession of Canada to England in 1763, calls for observation. In 1766 the representatives of François Bissot laid before the British Government a claim to be proprietors of the terre ferme de Mingan, commonly called "the seigneurie and post of Mingan." In support of their claim they do not appear to have furnished evidence of the contents of the grant of 1661, but they relied on an "Acte de Notoriété," signed by several citizens and notables of Quebec, two of whom, at least, were parties interested, to prove an immemorial possession of the seigneurie of the mainland of Mingan by the heirs of MM. F. Bissot and Lewis Jolyet. This claim was referred to the law officers of the Crown in England, who, in the year 1768, reported upon it. After observing that "the claim is of an exclusive right of property in the soil containing originally, in extent along the north shore of the River St. Lawrence from the Isle of Eggs to the Bay Phelipleaux which appears to be about 500 miles, and in depth into the country without bounds or limitation," but of which a space of about thirty leagues from Egg Island to Cape Cormorant was acknowledged to have been surrendered, the law officers comment on the uncertainty of the grant as well as of possession, and they conclude, "Under these circumstances, we are of opinion that this claim, standing as it does at present upon these papers, could not in any judicial inquiry be allowed in point of law as valid and effectual; at the same time there is reason to think that some part of this family has been in some kind of legitimate and authorized possession of some particular parts of the shore within the limits described; but the ground, the nature, and extent of such possession does not appear at present in such authentic manner as to be capable of receiving any judicial confirmation."

In 1781 the claimants appear to have endeavoured to supply the want of proof thus pointed out. On the 28th of May in that year F. J. Cugnet, on behalf of himself and others named, claiming to be seigneurs and proprietors in undivided shares of the seigneurial fiefs of the isles and islets of Mingan, of the isle of Anticosty, and of the terre ferme de Mingan, is alleged to have presented an Act of foi et hommage in respect of the said fiefs and seigneuries. A document of this date and to this effect is found in the register of foi et hommage, and it states that the "Seigneurie de la terre ferme de Mingan," commencing at Cape Cormorant, "jusqu'à la grande Ance vers les Esquimaux où les Espagnols faisaient ordinairement la pêche sur deux lieux de profondeur," was conceded by the company (of La Nouvelle France) on the 25th of February, 1661, to the Sieur François Bissot. Appended to this document is a certificate of Cugnet himself (who appears to have held the office of Keeper of the Papier Terrier) that this foi et hommage had been presented; but it is not signed by the Governor, and therefore has no validity. But from its having been found in the registry it has since been frequently assumed, though erroneously, to have had an official character.

This document contains two statements which are now known to be untrue, whether wilfully or not it is unnecessary to inquire. The one is that the grant of 1661 conceded a seigneurie from Cape Cormorant as far as the Grande Anse. It omits altogether the mention of the Sept Isles, and changes the language with regard to the Grande Anse. The second is that it introduces a limitation inland, thus supplying words which would meet the objection taken as to the uncertainty of the grant in this respect. It is said that these words are introduced in the margin of the document; but as the original is not before them, their Lordships cannot verify this statement.

The effect of these inaccuracies, whether intended or not, was that in 1803 MM. Vondenvelden and Charland, surveyors, in a work on the subject of the titles of ancient concessions include that of la terre ferme de Mingan, on the authority of the supposed Act of foi et hommage of 1781; and from this work the same error has been derived and continued in subsequent transactions. Thus in 1805, in an action at the suit of Ralph Rosslewin against one Crawford and others, the sheriff seized fifteen thirty-second undivided parts of the seigneurie of the Isles Mingan, "with all the rights in the seigniory of the mainland of Mingan." The Procureur Général claimed the droit de quint due to the Crown on the sale. The matter was referred to the arbitration of M. Planté, an advocate, who gave his decision and based it upon the supposition that the grant of

1661 was a concession of the terre ferme de Mingan to Sieur Fr. Bissot, and refers for his authority to the false entry of the 28th of May, 1781, in the register of foi et hommage and the work of MM. Vondenvelden et Charland. The demand and receipt on this occasion of the droit de quint by the Procureur Général has been relied on by the company as a recognition by the Crown of their title to a seigneurie of the terre ferme de Mingan. There is no proof that it was paid; but assuming that it was, it does not amount to a recognition by the Crown. A recognition to be effectual for the purpose of curing a defective title must be made with knowledge of the defects to be cured, and no such knowledge on the part of the Crown can in this case be inferred from the mere receipt by its officer of a fiscal due, under a mistake induced by the company's predecessors.

In 1837 James Stuart, on the part of several persons named, rendered faith and homage for, amongst other things, certain undivided shares in the Seigneurie de la terre ferme de Mingan. On this occasion the act of faith and homage is signed by the Governor, Lord Gosford. This would be primâ facie proof of the existence of some seigneurie on the mainland of Mingan; but this primâ facie proof is rebutted by the title relied on by the claimants, namely, that supposed to be derived from the grant of 1661, and the Ordonnance of Hocquart of 1733. The effect of these documents of title has been already considered.

Nothing calling for observation occurred after 1837 until the year 1854. Down to this time their Lordships are of opinion that the facts proved fail to establish that there was a seigneurie of the mainland of Mingan, or that the Crown had recognised its existence, although, chiefly from the supposed act of foi et hommage of 1781 containing the erroneous statement of the effect of the grant of 1661, a reputation had arisen that there was such a seigneurie.

With regard to the claim of the company to hold by prescription and immemorial possession, it is unnecessary to consider what would have been the effect of the evidence if the title of the company had rested upon this basis alone, because as the true root of their title has been shewn by the company themselves, there is no room for the application of the law of prescription. This is clearly stated by many authors of authority: "On ne peut pas prescrire contre son titre en ce sens que l'on ne peut pas se changer à soi-même la cause et le principe de sa possession . . . . il suit de là que lorsque le titre est représenté, c'est par lui qu'il faut régler la cause et le principe de la possession; et tant que le possesseur ne prouve pas une interversion légale soit par le fait d'un tiers, soit par une contradiction formelle, le titre reste la loi invincible qui sert à qualifier sa possession. Il y est ramené sans cesse par la loi et par la raison. C'est ce que les praticiens ont voulu exprimer par ce brocard; ad primordium tituli posterior semper refertur eventus:" Troplong de la Prescription, 522, 4th ed.

In this state of things the Legislature of the Province of Canada, deeming it expedient to abolish all feudal rights and duties in Lower Canada, passed for this purpose the Seigniorial Act of 1854 (18 Vict. c. 3), amended by the Act of 18 Vict. c. 103 (1855), and the Seigniorial Amendment Act of 1856 (19 Vict. c. 53). The 10th section of this last-mentioned Act is as follows: "Inasmuch as the following fiefs and seigniories, namely: Perthuis, Hubert, Mille Vaches, Mingan, and the island of Anticosti, are not settled, the tenure under which the said seigniories are now held by the present proprietors of the same respectively, shall be and is hereby changed into the tenure of franc aleu roturier."

This is an absolute statement by the legislature that there was a seigneurie of Mingan. Even if it could be proved that the legislature was deceived, it would not be competent for a court of law to disregard its enactments. If a mistake has been made, the legislature alone can correct it. The Act of Parliament has declared that there was a seigneurie of Mingan, and that thenceforward its tenure shall be changed into that of franc aleu roturier. The courts of law cannot sit in judgment on the legislature, but must obey and give effect to its determination.

It remains only to consider what was the seigneurie of Mingan to which the Act of 1856 referred. It has been contended for the Crown that there was a seigneurie of the isles and islets of Mingan which may have been intended. The answer to this contention is that the proper name of this last-named seigneurie was that of "the isles and islets of Mingan," and that there is no trace of evidence that it has been on any occasion otherwise designated, or that it has ever been known as the Seigneurie de Mingan.

An examination of the Act further proves that a seigneurie on the mainland was contemplated.

The original Act provides for the appointment of Commissioners (sect. 2), to whom (sect. 4) the Governor shall assign the seigneurie or seigneuries in and for which each of them shall act, and whose duty it shall be (sect. 5) "to value the several rights . . . with regard to each seigniory which shall be assigned to him as aforesaid."

By virtue of these provisions Henry Judah, one of the Commissioners, had assigned to him the making of the cadastre, and the valuation of the rights of the seigneurie of Mingan, and he has discharged his duties specifically with regard to the "seigneurie of the terre firme de Mingan," while on the other hand no mention has been made of the seigneurie of the isles and islets of Mingan.

Before beginning to prepare the schedule for any seigneurie it was the duty (sect. 7 of the Act of 1854) of the Commissioner to give public notice of the place, day, and hour at which he would begin his inquiry; he had power to examine on oath any person appearing before him.

Immediately after the making of the schedule, the Commissioner was bound (sect. 11 of the Act of 1854, and sect. 5 of the Act of 1856) to give eight days' public notice that such schedule would remain open for the inspection of the seignior and the censitaires of the seigniory during thirty days following the said notice, "and any person interested in the schedule may point out in writing any error or omission therein, and require that the same be corrected or supplied." Provisions are also made for the revision of the schedule, and it is enacted (sect. 8 of the Act of 1856) that no revision shall be allowed, unless application be made for the same within fifteen days after the Commissioner shall have given his decision under sect. 11 of the Act of 1854; and by the 10th section of the Act of 1855 it is enacted that, "after any schedule shall have been completed and deposited under the said Act, it shall not be impeached, or its effect impaired for any informality, error, or defect in any prior proceeding in relation to it, or in anything required by the said Act to be done before it was so completed and deposited, but all such prior proceedings and things shall be held to have been rightly and formally had and done, unless the contrary expressly appear on the face of such schedule; and the same rule shall apply to all proceedings of the Commissioners under the said Act, so that no one of them, when completed, shall be impeached or questioned for any informality, error, or defect in any previous proceeding, or in anything theretofore done or omitted to be done by the Commissioners or any of them."

It was open, therefore, to the Government on the one hand, or the persons claiming to be proprietors of the seigneurie of the terre ferme of Mingan to have complained in due time and in the manner prescribed, of any error in the schedule. As no such complaint was made, the schedule as deposited must be deemed to be correct.

Now, by the schedule drawn up by Henry Judah (dated the 23rd of January, 1864), it is certified that the "seigneurie de Mingan ou de terre ferme de Mingan" is scheduled in the country and district of Saguenay, and is not conceded; it contains fifty leagues of frontage by two leagues of depth, extending from Cape Cormorant up to the River Goynish, forming an area of 705,400 arpents, and is bounded in front by the River St. Lawrence, and along its depth and two sides by the public domain.

This schedule, with the Act under which it was made, must now be deemed to have conclusively established the existence and boundaries of the Seigneurie de Mingan referred to in the 10th section of the Act of 1856.

Routhier, J., by an independent examination of the evidence, has arrived at the conclusion, in which their Lordships entirely concur, that the territory in which the right to make establishments for fishing, &c., was granted by the Concession of 1661, did not extend further eastward than the River Goynish, and that there is no foundation for the claim to extend it to Brador Bay in the strait of Belle Isle. Their Lordships concur with

Routhier, J., in thinking that the bay referred to in the grant of 1661 as that where the Spaniards ordinarily fished was not that which is now called Brador Bay, but was the one indicated as the Baye des Espagnols on the map, presumably drawn up on the information of Sieur Jolyet, an experienced navigator, and one of the parties having an interest under the Concession of 1661. This bay exactly answers the description given in the grant of 1679 to Laland and Jolyet of the seigniory of the isles and islets of Mingan, "which follow one another to the bay called l'Anse aux Espagnols," and to the position assigned to it in the map of 1678, near the eastward end of those islands and near a place or river marked "Esquimaux." It is, however, unnecessary to examine this question in detail, as their Lordships are of opinion, for the reasons already given, that the schedule drawn up by Mr. Judah is conclusive on the subject of boundary.

Their Lordships will humbly advise Her Majesty that both appeals be dismissed, and that the judgment of the Court of Queen's Bench be affirmed, and they direct that the parties pay their own costs of the appeals.

Solicitors for the company: *Paine, Son, & Pollock.*
Solicitors for the Queen: *Bompas & Co.*

[PRIVY COUNCIL.]

JAMAICA RAILWAY COMPANY . . . DEFENDANT; J. C.*

AND 1892

THE ATTORNEY-GENERAL OF JAMAICA PLAINTIFF. Nov. 25, 29; Dec. 16.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Construction—Yearly or Half-yearly Bonds—Accounts.

Where, by agreement between the appellant company and the local government, second mortgage bonds were to be issued with the interest (non-cumulative) dependent on the yearly earnings; then, by a law passed to give effect thereto, the bonds were treated as half-yearly bonds with interest contingent on half-yearly profits; then bonds were issued in terms of the agreement and not the law; and then, by a certificate of the local government, the bonds were erroneously certified to be according to the law:—

Held, in a suit by the holders of the said bonds to expunge certain items debited against the half-year's income to the prejudice of the claim for half-yearly interest, that, reading the agreement and the law together, the intention was that the account should be taken at the end of each year and not upon the footing that there was to be a rest at the end of every half-year:

Held, further, that costs of issuing the bonds could not be charged against income to the prejudice of their holders; and that, with regard to the expenditure on stores, the amount chargeable to any one year must be regulated by what is fair in the interest of all concerned.

APPEAL from a decree of the Supreme Court (Nov. 2, 1891).

The facts and proceedings are stated in the judgment of their Lordships.

Sir *Horace Davey*, Q.C., and *Swinfen Eady*, for the appellant.

The Solicitor General (Sir *J. Rigby*), and *Jenkins*, for the respondent.

The judgment of their Lordships was delivered by

1892 Dec. 16.

LORD MACNAGHTEN:—

The purpose of this case was to raise certain questions on the accounts of the Jamaica Railway Company for the half-year

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* *Present*:—LORD MACNAGHTEN, LORD HANNEN, LORD SHAND, and SIR RICHARD COUCH.

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ending the 30th of June, 1890, which seems to have been the first half-year of the company's existence.

The government of Jamaica are the holders of a large amount of obligations of the Jamaica Railway Company, known as second mortgage bonds. The action was brought by the Attorney-General on behalf of the government and the other holders of these bonds, complaining of certain items as being improperly charged against income to the prejudice of the second mortgage bondholders. The Supreme Court of Jamaica upheld the contention of the government, and gave a decree, with costs, against the company for the sum of £3975 6*s.* 6*d.*, as "the difference between the amount paid to the second mortgage bondholders as interest for the half-year, which ended on the 30th of June, 1890, and the amount properly payable." From that decree the company has appealed.

In order to understand the questions between the government and the company, it is necessary to explain the position in which the company stood in relation to the government, to define the rights of the second mortgage bondholders, and to refer to some special provisions made for the protection of the government as holders of these bonds.

The Jamaica railway was a government line with sixty-five miles of road. Certain adventurers, who are conveniently described as "the promoters," proposed to form a company for the purpose of acquiring and working the railway, as it then existed, and also taking over and working as part of the undertaking certain extensions, about 120 miles in length, which the promoters offered to make in connection with the existing line. After a good deal of negotiation, both in the colony and in this country, an agreement was come to between the representatives of the government of Jamaica and the promoters, which is embodied in a contract dated the 29th of March, 1889, and a supplemental contract dated the 24th of May following. In pursuance of one of the terms of this agreement, a law was passed by the legislature of Jamaica, intituled: "The Jamaica Railway Company's Law, 1889." The agreement, as contained in the two contracts, is set forth in a schedule to the law. The law declares (sect. 2) that the agreement is thereby ratified and confirmed; the governor is authorized and required to perform and carry out the conditions thereof according to their purport, and the agreement is made binding on and available to the company, as if the company had been a party to the same. The law then proceeds to provide for the incorporation of the company and repeats with some amplification of details most of the provisions of the agreement. Within twelve months from the passing of the law, the sum of £100,000 was to be lodged in the government treasury in trust for the company when formed. Thereupon, the subscribers were to be incorporated as the Jamaica Railway Company. The company was empowered to issue first mortgage bonds, in accordance with the provisions of the agreement (sect. 47), to be secured by an assignment of all the company's property. The proceeds of those bonds were to be devoted solely to defraying the cost of extensions and of capital improvements on the line (Law, sect. 48; Agreement, sect. 14). The company was also empowered to issue second mortgage bonds to the extent of £800,000, £100,000 of these bonds were to be issued to the promoters together with a like amount of stock, in return for the sum lodged by them to the credit of the company. On the company making over to the government the cash deposit of £100,000, and the balance of the second mortgage bonds, and on the promoters assigning to the government their second mortgage bonds by way of security for the due performance by them of the terms of the agreement, the government railway with the rolling stock, stations, stores, and other property belonging to it, was to be transferred to the company. The balance of the company's ordinary stock was to be allotted to the promoters in parcels with like amounts of first mortgage bonds, in payment for extensions as the work progressed. There was, however, power to issue new stock with the consent of three-fifths of the votes of stockholders present, personally or by proxy, at a meeting specially convened for the purpose.

It will be observed that the whole of the first mortgage bonds, the whole of the second mortgage bonds, and the whole of the ordinary stock were appropriated to special purposes. It must, therefore, have been foreseen that on the transfer of the railway

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the company would enter upon the business of working the line without any cash in hand. The stores in hand on the day of transfer were to be included in the purchase, but it was provided that stores ordered and not then come to hand should be paid for by the company (Agreement, sect. 4).

It will now be convenient to turn to the principal clauses in the agreement and the law bearing on the rights of the second mortgage bondholders.

The agreement contains the following provision:—

"5. The second mortgage bonds shall bear interest at the rate of £4 per centum per annum conditional on the earnings of the railway being sufficient to earn that sum, and if in any year they are not sufficient, then at such lower rate as the earnings of such year may enable the company to pay; but there shall be no claim in any year for the unpaid balance in a past year. Such interest shall be a charge on the whole property and earnings of the company second only to the first mortgage bonds."

Sects. 55 and 57 of the law are in the following terms:—

"55. The interest of the second mortgage bonds issued by the company under the provisions of this law at the rate mentioned in the said agreement shall be paid out of the profits of each half-year before any dividend is paid on the stock of the company; but if in any year ending on such day as may be agreed on between the governor and the company, or, if no such day is agreed on, then on the 31st of December there are no profits available for the payment of the full amount of interest on the said bonds for such half-year no part of the deficiency shall be made good out of the profits of any subsequent half-year or out of any other funds of the company.

"57. At the end of any year in which the full interest shall not have been paid to the second mortgage bondholders it shall be lawful for any second mortgage bondholder suing on behalf of himself and the other second mortgage bondholders to bring an action in the Supreme Court against the company and if in such action it be made to appear that on a proper account being taken of the transactions and earnings of the company a larger net profit was earned by the company after paying all prior charges properly payable thereout than was divided by the company among the second mortgage bondholders, the plaintiff shall be entitled to judgment against the company for the amount of the difference between the amount paid (if any) as interest for such half year and the amount properly payable, provided that it shall not be lawful for the company to make any payment in satisfaction or part satisfaction of any such judgment that would in the year in which the same is made, or in any subsequent year prevent the company from paying the full interest payable on the second mortgage bonds for that year."

Besides these clauses there are several provisions, some for the protection of the second mortgage bondholders generally, and some for the special protection of the government, which ought not to be overlooked. It was provided (Agreement, sect. 15) that the cost of new buildings or works, or of any increase in the amount of rolling stock that might be deemed necessary for the development of traffic, should not be paid out of the earnings of the company. There were to be five directors, one of whom was to be nominated by the government (Law, sects. 87, 88). No contract for goods or stores in excess of £100 was to be binding on the company except with the concurrence of the government director, subject to an appeal to the governor in Privy Council (Law, sect. 82). Nothing beyond travelling expenses was to be paid to the directors for their services that would prevent the interest on the second mortgage bonds being paid in full (Agreement, sect. 30). There was to be an official audit of the company's books and accounts at such intervals as the governor might fix, so long as the government might continue to hold any second mortgage bonds. In case of any penalty recovered against the company being paid out of the company's assets so as to diminish "the amount that would otherwise be payable during that year to the second mortgage bondholders," the stockholders were to be jointly and severally liable to make good the deficiency so caused (Law, sect. 159).

As regards the nature and extent of the charge created in favour of the second mortgage bondholders, it may be observed that the second mortgage bonds are described as "a charge on the undertaking" in the Agreement, sect. 1. The interest on

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these bonds is declared to be "a charge on the whole property and earnings of the company second only to the first mortgage bonds" (Agreement, sect. 5). The Law, sect. 56, declares that these bonds "with the interest payable thereon, shall be a charge on all the property of the company assigned to trustees for the first mortgage bondholders to the same extent as but second only to the first mortgage bonds." The language varies, but the meaning is the same.

The transfer of the Jamaica railway to the company seems to have been completed on the 1st of January, 1890. The second mortgage bonds issued to the government, as part of the consideration for the purchase, bear that date. The bonds are in the form of an acknowledgment of indebtedness, with a promise to pay the principal sum mentioned in the bond "with interest thereon at a rate not exceeding 4 per cent. per annum conditional upon the earnings of the railway being sufficient to earn that sum, and if in any year they are not sufficient, then at such lower rate as the earnings of such year may enable the company to pay," such interest, as the same is earned, being payable on the first days of July and January in each and every year after the date of the bond. The bond then states, among other provisions of the Law, the provisions contained in sects. 55, 56, 57, and 159. It concludes with the following statement: "All provisions of whatsoever nature affecting second mortgage bonds, or the right of the holders thereof not mentioned herein but contained in the said Law, or in the agreement incorporated therein, shall be deemed to be, and hereby are declared to be, applicable to and part of this bond. This bond shall not be or become valid or obligatory to bind the company unless it bears the certificate of the Treasurer of the Colony of Jamaica that it has been issued by the company in accordance with the terms of the Jamaica Railway Company's Law, 1889." Endorsed is a certificate, signed by the Treasurer of the Colony, to the effect that "the within bond has been issued by the Jamaica Railway Company in accordance with the terms of the agreement of the 29th day of March, 1889, and of the Jamaica Railway Company's Law, 1889."

On the 1st of January, 1890, when the company took over the railway the stores in hand were of the value of £589 2*s*. It does not appear whether, on that day there were any stores ordered which had not come to hand. Nor is there anything to shew whether the stores in hand were or were not an adequate supply for the requirements of the railway as it then existed.

The accounts rendered by the company for the half-year ending the 30th of June, 1890, shewed a profit of £9934 15*s*. 1*d*., and no more, or about £6000 less than the half-yearly interest payable on the second mortgage bonds.

On the 24th of January, 1891, the government instituted this action, claiming an account of the net profits of the company for the half-year ending the 30th of June, 1890, and payment of so much as should be found divisible among the second mortgage bondholders.

Besides an item of small amount, which is not in question on this appeal, the statement of claim challenged two items in the half-year's accounts. A sum of £969 7*s*. 1*d*. was charged for engrossing and printing the mortgage bonds of the company. This charge was objected to altogether. The other item to which exception was taken was a charge in respect of stores. The stores in hand at the beginning of the half-year were, as already stated, of the value of £589 2*s*. In the course of the half-year, the company purchased stores of the value of £7283 19*s*. 1*d*., and paid for them out of the earnings of the half-year. They had on hand at the end of the half-year, stores of the value of £3595 1*s*. 5*d*. They deducted from their gross earnings the whole amount expended in the purchase of stores during the half year, whereas the government contended that only the value of the stores actually used or consumed during the half-year, ought to have been charged against the gross earnings, and that the sum of £3005 19*s*. 5*d*., being the difference between the value of the stores in hand on the 30th of June, 1890, and the value of the stores in hand on the 1st of January, ought to have been treated as part of the profits available for payment of interest on the second mortgage bonds.

In their defence, the company maintained the propriety of the half-year's accounts. They did not take exception to the scope of the action.

On the application of the plaintiff, the Supreme Court dealt with the questions between the parties as issues of law arising on the pleadings. Upon the trial of those issues, the Court held that the two sums of £3005 19*s.* 5*d.* and £969 7*s.* 1*d.* were not sums properly payable out of the gross earnings of the company for the half-year which ended on the 30th of June, 1890, in priority to the full interest of 4 per cent. payable on the second mortgage bonds. The decree which gave effect to the decision of the Court, and which was dated the 2nd of November, 1891, was prefaced by a statement to the effect that it appeared that "no question is raised between the parties on the ground that the accounts in this action appertain to a half-year and not to a full year."

It will be observed that the action was brought upon the footing that there was to be a rest at the end of every half-year. That seems to have been at the time the view of both parties, and it was accepted by the Court. The learned Chief Justice observes, that "the second mortgage bondholders are entitled to interest only if, in any particular half-year, the company makes a profit, i.e., a net profit sufficient to pay the interest in whole or in part. If there are no profits earned by the company in any particular half-year, the bondholders lose all claim for interest for that half-year."

In the course of the opening, the counsel for the parties were invited to consider whether the view upon which the suit was framed, and upon which the Supreme Court proceeded, could be supported. The point was fully argued. The Solicitor-General, on behalf of the government, contended that, according to the express terms of the law, the bonds were half-yearly income bonds carrying interest for the half-year at the rate of 4 per cent. per annum contingent on the profits of the half-year. He admitted that, by the terms of the agreement, the second mortgage bonds were to be yearly bonds. But he insisted that the language of sects. 55 and 57 of the Law, shewed clearly that a change had been made when the matter was under the consideration of the Legislature. The thing was done clumsily, no doubt; the draft was not thoroughly revised; the language was not happy, but the meaning was plain. That was the view presented to their Lordships. Whether it be right or wrong it certainly credits the managers of the company and the officials of the government with singularly short memories. The law is passed in June, 1889. The bonds are issued in 1890. The operative part of the bonds repeats the very language of the agreement in the clause which it is said the Law has amended. And the government certify that the bonds are in accordance with the Law.

In the opinion of their Lordships, although the language used is not happily chosen, there is no variance in effect between the terms of the agreement and the provisions of the Law. The expression "for such half-year," which occurs in sect. 55 and sect. 57, and which alone creates any difficulty, must mean "for each half of the year for which the interest is to be calculated," or, in other words, "for each half of the year ending on the 31st of December." All that sect. 55 says is that "if . . . . there are no profits available for the payment of the full amount of interest on the said bonds for such half-year," that is, "if there are not profits available for the payment of the full amount of interest on the said bonds for each half of the year ending on the 31st of December," then the deficiency is not to be made good afterwards. Sect. 57 says that "at the end of any year in which the full interest shall not have been paid, an action may be brought and an account is to be taken—that is, of course, an account for the full year—and then judgment is to be given for the amount of the difference between "the amount paid, if any, as interest for such half-year," or, in other words, "the aggregate of the sums paid as interest for each half of the year ending the 31st of December," and the amount "properly payable."

If this be the correct view, it follows that the decree cannot be supported. The action was in a great measure misconceived. But in their Lordships' opinion it would not be right, considering the footing upon which the litigation has been conducted, and the statement or admission contained in the decree as to the period of accounting, to dismiss the action at this stage of the proceedings. The proper course will be to discharge the decree of the 2nd of November, 1891, and in lieu thereof to order that an account be taken of the transactions and earnings of the

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Jamaica Railway Company for the year ending the 31st of December, 1890, with a direction that in taking such account no charge is to be made in respect of the cost of engrossing and printing the mortgage bonds of the company. There can be no justification or pretence for such a charge as against the second mortgage bondholders. The effect of admitting it would be to make mortgagees pay the costs of their mortgagors.

The question as to the expenditure on stores is a more difficult one. The result must depend on the circumstances of the case, which have not as yet been fully brought before the Court. In reference to this matter, their Lordships do not see their way to introduce any special direction into the decree. But it may be useful to call attention to some general considerations which must be kept in view, and which may help the parties to come to a settlement without further litigation.

On the one hand, it was contended that every penny expended out of income during the period of accounting, must be brought into the account and charged against the income of that period, and that at all events, as the directors of the company were placed in the management of the company's affairs, the Court ought not to interfere with their discretion when they were acting bonâ fide. The argument on behalf of the government was, that the mortgage bondholders are entitled to receive in or towards payment of interest due to them, every penny of profit made during the period of accounting, in whatever shape or form the profits may be found at the end of the period, and whatever may be the consequences to the company.

Their Lordships are not able to accept either view without some qualification. When the law directs that an account is to be taken, it would be absurd to suppose that the Court is to be bound by what the company—the accounting party—has actually done. That is the very thing which the law intends to be reviewed. Nor is every item of expenditure necessarily to be debited wholly against the income of the period in which it occurs. It may be fair and proper to spread some items over a longer time—a case contemplated and provided for in table A, sect. 80, of the first schedule to the Companies Act, 1862. The company is bound to conduct its business fairly and to make up its accounts fairly, with a due regard to the obligations which it has undertaken towards the bondholders. That is the measure of the duty in this respect cast upon the directors. It would perhaps not be easy to define it more precisely.

On the other hand, the contention put forward on behalf of the government is too narrow. They would have the account taken as if there was to be a periodical stoppage of the business and a recurring winding-up. But the charge in favour of the bondholders is a charge upon the undertaking. To use Lord Cairns' well-known expression: "The undertaking is made over as a going concern, ... as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and pay the debt." The fruit is to be gathered in its season. If, when the time arrives to gather the ripe fruit you strip the tree bare of everything on it, the expectations of the coming year may perhaps be disappointed. For anything that appears, the stores in hand may have been exceptionally reduced when the company took over the business. It may be necessary in the interest of all concerned, including the bondholders, to keep a larger stock on hand. If so, why should not the stock be kept up out of income? There is nothing in the law to compel the company to divide everything in the shape of profits as on a winding-up. The law speaks of what the earnings of the year "may enable the company to pay"—of "profits available for the payment" of interest—of "the amount properly payable." The agreement clearly contemplated that the company might have to pay out of income for stores ordered but not come to hand when they took over the railway. There is a prohibition against paying out of earnings for any increase of rolling stock. There is no such prohibition in reference to the supply of stores requisite to be kept in hand. As regards an undue increase in the amount of stores, the government took care to protect themselves in a different way. They stipulated that no purchase of stores in excess of £100 should be valid, without the concurrence of the government director or the governor of the Privy Council.

In the result, therefore, their Lordships will humbly advise

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Her Majesty that judgment should be pronounced in accordance with the view they have expressed.

Each party will bear their own costs of the litigation up to the present time, including the costs of the appeal.

Solicitors for appellant: *Freshfields & Williams.*
Solicitors for respondent: *Shaw, Roscoe, Massey, & Co.*

[PRIVY COUNCIL.]

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Dec. 14, 15.

IN THE MATTER OF A SPECIAL REFERENCE FROM THE BAHAMA ISLANDS.

Contempt of Court—Nature of the Offence—Obstruction to Public Justice—Power of Crown to remit Sentence.

Where a letter published in a colonial newspaper contained criticisms on the conduct of the Chief Justice of the colony of such a nature that it might have been made the subject of proceedings for libel, but was not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law:—

Held, that the same did not constitute a contempt of Court.

It appearing that the editor had, on notice from the Court, refused to discover the name of the writer, and had thereupon been sentenced to fine and imprisonment during pleasure for the publication, and to fine or imprisonment for the refusal, but had been released by order of the Governor:—

Held (1.) that the Chief Justice had no legal authority to require either the name of the writer or the manuscript of the letter;

(2.) That the Governor had, under his commission, power in the circumstances to remit the sentence.

There may not be imported into a case of this kind any matter which was not in evidence against the defendant, nor will their Lordships permit any such matter to be laid before them.

THIS was a special reference on a case by the Secretary of State for the Colonies to the Judicial Committee. The case stated that in May, 1892, Roger D. Yelverton, Esq., Chief Justice of the Bahama Islands, West Indies, addressed two letters to a newspaper published at Nassau, the chief town of the colony, called the *Nassau Guardian*, on questions affecting the health of the town. These letters were published in that paper on the 4th of May, 1892, and the 11th of May, 1892, respectively.

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* *Present:*—THE LORD CHANCELLOR, THE LORD CHIEF JUSTICE, LORD WATSON, LORD HOBHOUSE, LORD ASHBOURNE, THE MASTER OF THE ROLLS, LORD MACNAGHTEN, LORD HANNEN, LORD SHAND, SIR RICHARD COUCH, and LORD JUSTICE BOWEN.

On the 14th of May a letter, signed "Colonist," and containing criticisms of the conduct of the Chief Justice, was published in the *Nassau Guardian*. The letter is as follows:—

"To the editor of the *Nassau Guardian*.

"Sir,—The combined wisdom and vigilance of 'Governor Shea, Providence, and the Board of Health' being insufficient to preserve the health of this community, Mr. Yelverton has come to the rescue, and it is but fair to him that his protest should be echoed by every citizen of this city.

"What is the good of increasing the salary of the Chief Justice if his mind is to be disquieted and alarmed through fear of fever? For our additional £300 a year we have all that our souls yearned for, viz., an English barrister, and we should do all that lies in our power to preserve the health and life of this luminary of the English bar.

"While the increase of salary attached to the office of Chief Justice was being discussed, Mr. Bullard, the senior member for Exuma, suggested that we wait and 'see our man first'! Good advice; but fortunately the waiting policy was not needed in this instance, for in Mr. Yelverton we have one who surpasses our highest expectations of the kind of man who would come to pocket our £1000 a year. In his Court Mr. Yelverton is supreme. Custom, magistrates and lawyers bow to supremacy; and, like Selkirk, 'there is none his *right* to dispute.' Nor does he ignore little things—when he stoops to such, then is he great indeed. Penny readings, daughters of Ruth, Mrs. Newton Jones, and W.C.T.U. have all felt the fostering touch of his strong hand.

"Search the annals of the bench of every country, of every age, and I defy creation to produce a more noble, more self-denying, and more virtuous exhibition of a tender conscience than was afforded by our Chief Justice in refusing to accept a gift of

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pine-apples! Some cynic has said, 'Every man has his price.' It is assuring to this community to know that the 'fount of justice' in this colony is above the price of even one dozen pine-apples. Mr. Yelverton's noble words of scornful renunciation should be graven in letters of gold upon the walls of every magisterial office in this colony; then, and not till then, will sweet potatoes, pigeon peas, &c., cease to exert their baneful influence on the administration of justice in this colony. But should we be selfish and confine the influence of such virtue to the limited area of this colony? No, Mr. Editor, I and others cherish the hope that this beautiful incident will become historical, and the whole world be benefited by this last and greatest proof of the purity of English justice. Difficult as it is, Mr. Yelverton has mastered the problem of being great in little things. When a boy I remember reading of Judge Gascoygne and Prince Hal; I can but hope the little boys of the future will read of the noble conduct of our Judge Yelverton.

"But I must not confine myself to words of heartfelt commendation. Duty and esteem call upon me to speak words of warning; and it is well that Mr. Yelverton should know that a great many people of this city are mean enough to say that 'He should risk his valuable life and attend to the duties of his office in summer as well as winter. They contend that the day of non-resident officialdom is over, and that a man should reside in the colony that pays him his salary. The *law* allows six weeks' leave of absence, and Mr. Yelverton should be subservient to that law, if to no other.' I say to these fellows of the baser sort, 'Now, just suppose we had a fool for Chief Justice, would ten months and two weeks' sticking to his office make him worth a thousand a year?'

"Mr. Yelverton should also know that most of the pine-apples grown in this colony are cultivated on the joint account of the landowner and labourer, and in accepting a gift of pines, one runs the risk of receiving stolen property. And now for one more bit of information, that a 'tender foot' should be provided with, viz.: Fevers, like thunderstorms, have their uses in West Indian colonies. Fever is regarded by the native as a merciful provision of Providence to clear the atmosphere of the civil service of some officials who are exhaled and emanate from Downing Street.

"If, in spite of the wise protest of Mr. Yelverton, the Board of Trade persists in landing 300 tons of pernicious coal in this city, the executive should stipulate that this Government shall have the privilege of erecting, above the coal, offices to be occupied by such officials as are costing the colony more than they are worth, and thus further the ends of a gracious Providence. But, Mr. Editor, I hope this coal will not be landed. It will arouse such disquieting thoughts in the minds of some people. Added to the heat of our summer, coal is an awfully unpleasant reminder of a place which is not called heaven.'

"Not being an Englishman, I am not afraid of noxious gases or destructive microbes. We colonists have had many camels of incompetence forced down our throats. We cease to strain over a microbe more or less. For myself, and on behalf of others who consider health of paramount importance, I thank Mr. Yelverton for his unselfish protest; and more, that as he has sided with Providence, Governor Shea, and the Board of Health, we are certain to enjoy immunity from fevers this summer.

"(Sd.) Colonist."

It will be observed that the letter contains sarcastic allusions to a refusal by the Chief Justice to accept a gift of pine-apples. This appears to refer to a statement made by the Chief Justice from the Bench on the 26th of April, 1892, in the following terms:—

"A few days ago one of the men in whose favour I had given judgment in the case from Eleuthera, wrote to me offering a present of pine-apples. Although this was after the judgment was given, it was a very wrong thing to do. It seems possibly a trivial matter, but I view it differently. It must not be forgotten that I have by my conduct to sustain the rectitude of various resident justices, necessarily brought into close contact with the people. It is wrong to accept any present whatever from any one who is, or who has recently been, or who is known as likely to be, a suitor in the Court. It is needless to say that I refused these pine-apples."

The Chief Justice's attention having been drawn to this letter,

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he, by letter of the 16th of May, 1892, requested Mr. Alfred E. Moseley, the editor of the *Nassau Guardian* (being also the proprietor and publisher), to attend at his (the Chief Justice's) chambers on that day. Mr. Moseley attended, in accordance with the request, when the Chief Justice required him to give up the name of the writer of the letter signed "Colonist," and to hand over the manuscript thereof before four o'clock on that day, under peril of committal. Mr. Moseley in the afternoon wrote to the Chief Justice, declining to give up the name of the author, or the manuscript of the letter referred to.

Mr. Moseley was the same afternoon served with notices signed by the Chief Justice, to attend the Court on the following day (1.) to bring with him and produce the manuscript of the letter signed "Colonist," and also all letters, notes, envelopes, or other documents which accompanied or in any way referred thereto; (2.) on his contemptuous refusal to discover the name of the writer (if any) of such article or letter which the notice stated appeared to be in contempt of the Court and of the Chief Justice thereof, and to produce and shew to the Court the manuscript of such article or letter, "I, as Chief Justice of this Colony, do order that the said Alfred E. Moseley attend before me on Tuesday, the 17th day of May, 1892, at the Court House, in Nassau, at 10.30 o'clock in the forenoon, to answer for his said contempt of Court, and to be further dealt with according to law; and I direct that the provost-marshal, or, in his absence, his deputy, shall, in addition to the tipstaff of the Court, be present at the same time and place to execute the orders of the Court."

On the 17th of May Mr. Moseley duly attended the Court, and the Chief Justice pronounced judgment, sentencing Mr. Moseley to be kept in prison during the Chief Justice's pleasure for contempt of Court and of his official position, for publishing the letter, and also to pay a fine of £40 to the Court, and to be imprisoned, in addition to the other imprisonment, until such fine should be paid.

For the refusal to discover the name of the writer of the letter, Mr. Moseley was sentenced to pay a further fine of £25, or to be imprisoned until the said fine should be paid.

Mr. Moseley was also adjudged to pay the cost of the proceedings. In pursuance of the above judgment Mr. Moseley was thereupon conveyed to prison.

A deputation of inhabitants of Nassau thereupon waited on the Governor (Sir Ambrose Shea, K.C.M.G.), urging the release of Mr. Moseley; and the Governor, on the same day, telegraphed to the Secretary of State as follows:—

"Chief Justice has recently written letters outside his province in the papers, and a satirical criticism followed them. For this he has sentenced to fine and imprisonment the editor, for alleged contempt of court, time to prepare case being refused. Deputation from influential persons, coloured and white, have waited on me to procure his release. Have I the power to act? Attorney-General absent."

To which Lord Knutsford replied, on the 18th of May, by telegram—"You have power to release prisoner."

On the 18th of May the Chief Justice, who had addressed a letter to the Governor as to rumours he had heard as to Mr. Moseley's release, was informed by letter from the Governor that he was clothed with the necessary authority to release Mr. Moseley, and had given orders accordingly.

The Chief Justice thereupon sent, at 4.30 p.m., the following telegram to the Secretary of State:—

"Release of Moseley, who is in contempt of my Court, without any communication with me and against my consent; no circumstances require it. I protest against it."

This telegram was received at the Colonial Office on the 19th of May. The Chief Justice also caused to be served on the keeper of the prison, at 5 p.m., the following document signed by himself:—

"You are required to take notice, under the seal of our Court and the signature of our Chief Justice, that if you release Alfred E. Moseley, now in prison for contempt of Court (and who has not purged his contempt), from prison, you will act without the authority of our said Court. And further take notice, that our Chief Justice has not been informed of any consideration of the subject of the release of the said A. E. Moseley, or of any communication thereon."

Mr. Moseley was, however, by order of the Governor, released from prison on the evening of the 18th of May, at 6 P.M.

The letters patent constituting the office of Governor of the Bahamas conferred authority "to grant to any offender convicted of any crime in any Court, or before any judge, justice, or magistrate within our said islands, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any real offender, for such period as to our said Governor may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable unto us."

The questions which the Secretary of State desired to submit for reference to the Judicial Committee of the Privy Council are the following:—

1. Was Mr. Moseley guilty of contempt of Court in respect—
    (a) Of the publication of the letter signed "Colonist," in the *Nassau Guardian?*
    (b) Of his refusal to give up the name of the writer, or to hand over the manuscript of the letter?
2. If so, were the sentences passed for these offences respectively, or for either or both of them, in accordance with law?
3. Had the Governor power, in the circumstances, to order the release of Mr. Moseley?

The Attorney-General (Sir *Charles Russell*), *the Solicitor-General* (Sir *J. Rigby*), and *Sutton*, for the Secretary of State:—

The first question is whether the letter of "Colonist" constituted a contempt of the Court. As regards Superior Courts of Record, a contempt could be committed by a matter not occurring coram curiâ. A libel upon a judge, holding him up to contempt and ridicule in his character as judge, so as to lower him in the estimation of the public amongst whom he exercised his office, is a contempt of Court. The reason is that the judge represents the majesty of the law. Two passages in the letter were referred to (1.), that commencing "the day of non-resident officialdom is over," which in effect imputed that the judge was a fool. [The Lord Chancellor:—It was a letter written in the course of newspaper controversy, not a volunteered attack. Lord Watson:—The substantial question is, does the letter refer to him in his official capacity ?] It is submitted for consideration whether it was or not an attack directly against him as judge, and that the circumstances of the colony under which it was made must be considered. (2.) The passage beginning, "Fevers, like thunderstorms." [Lord Hobhouse :—Your suggestion is that a contempt has been committed. Does any one represent the opposite view ?] No, the view put forward is suggested for consideration by the Committee.

As regards the order, it was not for imprisonment for a definite time, but the meaning was "until further order." [Lord Hannen :—There are many precedents for a general committal; and "during pleasure" might mean till further order.] Yes; and, the practice in the Court of Chancery was to commit for an indefinite period, leaving applications for release to be made again and again until the contempt was considered to be purged. If the order had been for a fixed term, that might prevent the judge interfering before the term had expired. As regards the second sentence, that was for something which was plainly not an offence. But even assuming a contempt to have been committed, which might properly form a foundation for the committal order, the Governor had, it is submitted, clearly the power to remit it. There are two classes of committal for contempt, (1.) where it is made in litigation, in furtherance of a legal right; in such case it is appealable, and though the Crown could interfere, it would be unconstitutional to do so. (2.) Where it is for criminal contempt; in such case it is not appealable, and is included in the class of offences which the Governor was by his letters patent authorized to pardon. As to the prerogative of the Crown to release on committal for contempt, reference was made to a speech of Lord Selborne's in allusion to the *Rev. Mr. Green's Case* (1). If the Governor had power to pardon, his interference was a matter for his discretion, and that point was not referred to their Lordships. As regards the omission to pardon first, and then order a release, it was contended that that did not go to the substance of the case. To shew the distinction between the two classes of contempt, and that one was a public or criminal offence, reference was made to *Re M'Williams* (1); *Wellesley* v. *Duke of Beaufort* (2); *In re Pollard* (3); *In re Freston* (4); *Harvey* v. *Harvey* (5), and to *O'Shea* v. *O'Shea and Parnell* (6), which it was contended accurately and completely stated the law. [Lord Macnaghten referred to in *In re Clements* (7) before Malins, V.C., in which there was an appeal.] Reference was then made to *Ex parte Fernandez* (8); Hawkins' Pleas of the Crown, tit. Contempts, sect. 7, and Attachments, c. 22, sect. 33; Viner's Abridgement, tit. Contempt; Blackstone (Stuart's ed.) 4th vol., p. 334, c. 20, old paging 286; *Lechmere Charlton's Case* (9); *In re Read and Hugginson* (10); *King* v. *Almon* (11); *In re Johnson* (12); *In re M'Dermott* (13). In *Rainy* v. *Justices of Sierra Leone* (14) Her Majesty was advised to remit fines for contempt, by virtue of the royal prerogative. If there is power to remit fines, there is also power to remit imprisonment. See also Oswald on Contempt, p. 2.

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(1) Hansard, vol. 276, p. 1714.

Brynmor Jones, and *J. W. M'Carthy*, for the Chief Justice, contended that the case stated by the Secretary of State did not contain all the facts which were present to the mind of the judge when he made the committal order, or which were relevant to the matter in hand. [The Lord Chancellor:—Was any evidence given or documents put in at the hearing beyond what was before their Lordships?] No; but it was contended that upon the issue whether a particular publication is a contempt, the judge is entitled to take into account the general state of the country and the surrounding facts which had come to his knowledge. [The Lord Chancellor:—Can you refer us to any authority for importing into a case against an individual, any matter which was not put in against him or brought to his knowledge, or in process before the judgment was pronounced?] No. [The Lord Chancellor:—With regard to the documents headed "Notes by the Chief Justice of the Colony" which do not belong to the record, they consist in large part of a number of irrelevant allegations about people in the colony, and have no possible bearing on the questions of law which have been referred to this Board. They cannot be allowed to remain here.] The documents were thereupon withdrawn.

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(1) 1 Sch. & Lef. 169.
(2) 2 Russ. & My. 639, 665, 667, 668.
(3) Law Rep. 2 P. C. 106.
(4) 11 Q. B. D. 545.
(5) 26 Ch. D. 644.
(6) 15 P. & D. 64.
(7) 46 L. J. (N.S.) 375.
(8) 10 C. B. (N.S.) 25.
(9) 2 My. & Cr. 316.
(10) 2 Atk. 471.
(11) Wilmot's Opinions and Judgments, p. 243, 270.
(12) 20 Q. B. D. 68.
(13) Law Rep. 2 P. C. 341.
(14) 8 Moo. P. C. 47.

The powers possessed by the local court were conferred by 40 Geo. 3, c. 2, and included all the powers which the Courts of Chancery, King's Bench and Common Pleas, possessed in England. The three points to be considered are (1.) was there any evidence of contempt, (2.) was there in fact contempt, (3.) having regard to the discretionary nature of the jurisdiction, did the judge exercise it properly? The jurisdiction of superior courts as to punishing for contempt had never been defined either in regard to the nature of the acts and defaults which were held to constitute a contempt, or as to the amount of fine or duration of imprisonment. Moreover, in exercising the jurisdiction, the Court was the judge of the law and the fact. Reference was made to *Burdett* v. *Abbott* (1); *In re Onslow and Whalley* (2), and *In re Skipworth* (3). A fair interpretation of the letter in question, is that it was calculated to prejudice possible jurymen. It affected the administration of justice in this way. It would be taken by jurymen to mean that the Chief Justice was not a persona grata to influential people in the colony, and that was calculated in a small colony to undermine his influence. Then as to the editor being in contempt for not giving up the name of the writer or the manuscript, no authority could be cited in support of it; but there was a power in the Court as conservator of the peace to proceed by way of attachment. Reference was made to Blackstone (3rd ed.), vol. 4, p. 283, bk. iv., c. 20, and to the Statute Westminster 2 (13 Edw. 1, c. 39) lately repealed by the Statute Law Revision Act (50 & 51 Vict. c. 55, s. 39).

With regard to the Governor's power to release, it depends upon whether Mr. Moseley was a person convicted of crime within the meaning of the Governor's letters patent. He was not convicted of crime, and therefore neither the Crown nor

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(1) 5 Dow. 165.
(2) Law Rep. 9 Q. B. 219.
(3) Law Rep. 9 Q. B. 236.

Governor had power to pardon him. Contempt of court was a civil proceeding. The writ in such a case was civil and not criminal: Comyn's Digest tit. Courts. [Lord Justice Bowen :— If you proceeded by indictment you would conclude against the peace of the Queen? The essence of the offence is, that it is against the public not the judge, an obstruction to public justice.] Reference was made to *Attorney-General* v. *Bowman* (1); Chitty's Archbold Criminal Pleadings (18th ed.), p. 68. The Court does not exercise criminal jurisdiction without information or process: see Crompton's Justices of the Peace (ed. 1617), p. 9. The civil writ of attachment is very old—a process by which the Court got seizin of civil cases: see Booth on Real Actions, p. 8.

The Solicitor-General replied as to the prerogative of pardoning:—

The Crown could pardon before or after conviction, or before trial, and not only crimes but spiritual offences as well: see Hawkins' Pleas of the Crown, bk. 2, c. 37, s. 41, Ca. in Chancery, 26 Car. 2, p. 238; *In re Davies* (2). In *Fernandez's Case* (3), Willes, J. said that a conviction for contempt was a conviction for an offence against the law. There was nothing in the letters patent to restrict the Governor's exercise of this portion of the prerogative.

1892 Dec. 15.

No judgment was given, but the following report dated the 15th of December, 1892, was made by their Lordships and confirmed by Her Majesty's Order in Council dated the 30th day of January, 1893.

The Lords of the Committee in obedience to Your Majesty's Special Order of Reference of the 26th of November, 1892, have taken the matter referred to them by such order into consideration, and having heard the law officers of the Crown and also counsel instructed by the Chief Justice of the Bahama Islands their Lordships do agree humbly to report to Your Májesty as follows:—

1. (*a*) That the letter signed "Colonist" in *The Nassau*

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(1) 2 B. & P. 532, n.

(2) 21 Q. B. D. 236, 238.

(3) 10 C. B. (N.S.) 25.

Guardian though it might have been made the subject of proceedings for libel was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of the law, and therefore did not constitute a contempt of Court.

(*b*) That Mr. Moseley was not guilty of contempt of Court in respect of his refusal to give up the name of the writer or to hand over the manuscript of the letter, there being no authority in point of law to require him to do either.

2. That assuming contempts of Court to have been committed the sentences passed were in accordance with law. The sentence passed in respect of the publication of the letter though not in the usual form amounted in effect to a general committal for contempt and was therefore lawful.

3. That the Royal Prerogative extends to the remission of sentences which are merely of a punitive character, inflicted for contempt of Court, that the Commission of the Governor of the the Bahama Islands vested in him the power to exercise the Royal Prerogative in this respect, and that he had therefore power, in the circumstances, to order the release of Mr. Moseley.

Solicitor for the Secretary of State: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.*
1891
Nov. 18;
Dec. 9;
1892
Feb. 17.

HUNTINGTON . . . . PLAINTIFF;

AND

ATTRILL . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF APPEAL FOR ONTARIO.

International Law—Foreign Judgment—Penal Actions—Distinction between Public and Private Penalties.

To an action by the appellant in an Ontario Court upon a judgment of a New York Court against the respondent under sect. 21 of New York State laws of 1875, c. 611, which imposes liability in respect of false representations, the latter pleaded that the judgment was for a penalty inflicted by the municipal law of New York, and that the action, being of a penal character, ought not to be entertained by a foreign Court:—

Held, that the action being by a subject to enforce in his own interest a liability imposed for the protection of his private rights, was remedial, and not penal in the sense pleaded. It was not within the rule of international law which prohibits the Courts of one country from executing the penal laws of another or enforcing penalties recoverable in favour of the State:

Held, further, that it was the duty of the Ontario Court to decide whether the statute in question was penal within the meaning of the international rule so as to oust its jurisdiction; and that such Court was not bound by the interpretation thereof adopted by the Courts of New York.

APPEAL from a decree of the Court of Appeal (Jan. 13, 1891) affirming a decree of Street, J. (Sept. 15, 1888), and dismissing the appellant's action.

The facts and proceedings are stated in the judgment of their Lordships. The judgment of Street, J., is reported in 17 Ontario Reports, 245, and the judgments in the Appeal Court are reported in 18 Ontario Appeal Reports, 136.

Street, J., held that, according to international law, penalties imposed by statute can only be enforced in the tribunals of the State by the laws of which they are imposed, and that the principle applies to actions upon judgments for such penalties. He further held that the claim in this case was an action for a penalty within the above rule, basing his opinion upon New York decisions to that effect.

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* *Present:*—THE LORD CHANCELLOR (LORD HALSBURY), LORD WATSON, LORD BRAMWELL, LORD HOBHOUSE, LORD MORRIS, and LORD SHAND.

In the Appeal Court the judges were equally divided in opinion. Burton and Maclennan, JJ.A., held that the question whether the action in New York was for a penalty or not was concluded by the decisions of the New York Courts. Hagarty, C.J., while agreeing that no action is maintainable on the judgment of a foreign State in respect of a penalty inflicted by the laws of such State, dissented from the decisions of the New York Courts, and held that the liability imposed by the statute in question was not a liability in the nature of a penalty. Osler, J.A., agreeing with the conclusion of Hagarty, C.J., held that the liability in question could not be regarded as a penal liability within the meaning of the principles of international law in question, and consequently that the action was maintainable. He was of opinion, however, that no action would have been maintainable in the Canadian Courts upon the cause of action, in respect of which the judgment was given in the New York Supreme Court.

Sir *Horace Davey*, Q.C., *Finlay*, Q.C., and *Pollard*, for the appellant, contended that the liability imposed by the New York State Act was not a liability in the nature of a penalty within the meaning of those provisions of international law which prohibit courts of justice from enforcing penalties inflicted by the laws of a foreign State. The action on the judgment obtained by the appellant accordingly was maintainable. The judgment had been obtained in respect of a liability incurred by the respondent for all the debts of a company under sect. 21 of the New York Act. That liability was in reality and under all the circumstances contractual, and not by way of penalty, and the action in which it was enforced was not a penal action, but one by which a private remedy was sought to be enforced. The appellant contracted with the company, on the faith of the liability imposed in his favour as the respondent, by sect. 21. That liability resulted in debt by the respondent. [LORD BRAMWELL:—What provision as to limitation would have applied to the case?] The ordinary provision with regard to debt. The action was a civil remedy to enforce payment of debt, not to enforce a penalty due to the public, nor even for the recovery of damages. By the law of the State of New York the action was not a penal action. Nor was it such by the law of the Ontario Court, which ought to decide by the principles of English law whether an action on such a judgment was maintainable against the respondent. By the law of England such action is maintainable; being brought on a judgment of a Court of competent jurisdiction creating an obligation on the part of the judgment debtor to pay the amount. Reference was made to *Godard* v. *Gray* (1). With regard to penal laws, Wharton's Law Lexicon defines them as of three kinds: poena pecuniaria, poena corporalis, and poena exilii, all prohibiting an act, and imposing a penalty for the commission of it. Penal actions are those brought by a common informer, or by the public authority, to redress a public wrong; remedial actions are those brought by the party injured to redress a private wrong. See *Bones* v. *Booth* (2); *Hussey* v. *More* (3); *Earl Spencer* v. *Swannell* (4); and for American authorities, *Merchants Bank* v. *Bliss* (5); *Stokes* v. *Stickney* (6). Reference was also made to the judgments of the two dissentient judges in *Attrill* v. *Huntington* (7); *Steam Engine Company* v. *Hubbard* (8); *Flash* v. *Conn* (9).

The Attorney General (Sir *R. Webster*), *Gore* and *Ackwith*, for the respondent, contended that, according to principles of international law, the judgment sued on created no obligation on the part of the respondent which a foreign State will recognise. The Courts of the country where the judgment is sued on must judge for themselves as to the nature of the judgment, although in doing so they will pay great regard to any decisions of the Courts of the country where the judgment was passed, and to the reasons on which such decisions proceed. It was contended that this judgment was of a punitive or penal nature, and as such was enforceable only by the Courts of New York. Here,

(1) Law Rep. 6 Q. B. 139.
(2) 2 W. Bl. 1225.
(3) Cro. Jac. 413.
(4) 3 M. & W. 154.
(5) 35 N. Y. 412.
(6) 96 N. Y. 323.
(7) 70 Maryland Rep. 191.
(8) 101 U. S. (11 Otto.) 188.
(9) 109 U. S. (2 Davis) 371.

by universal consent of all the Courts of the country where the Act and the judgment were passed, an action of this kind has been treated as penal. They held that a liability of the kind sought to be enforced in this case is in the nature of a penalty, that it bears no relation to the actual loss or damage sustained by the party to whom the action is given, that it is punitive in its nature and is inflicted upon grounds of public policy. Reference was made to *Merchants Bank* v. *Bliss* (1); *Wiles* v. *Suydam* (2); *Easterly* v. *Barber* (3); *Knox* v. *Baldwin* (4); *Veeder* v. *Baker* (5). In those and other cases, causes of action of this nature have been held to be within a New York Statute of Limitation applicable solely to actions for penalties. Reference was also made to *Jones* v. *Jones* (6); *Hobbs* v. *Hudson* (7); *Attrill* v. *Huntington* (8); *First National Bank of Plymouth* v. *Price* (9); *Steam Engine Company* v. *Hubbard* (10); *State of Wisconsin* v. *Pelican Insurance Company* (11); *De Brimont* v. *Penniman* (12); *Robinson* v. *Currey* (13); *The Halley* (14).

Finlay, Q.C., replied.

The judgment of their Lordships was delivered by

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Feb. 17.

LORD WATSON:—

The appellant, in June, 1880, became a creditor for money lent to the Rockaway Beach Improvement Company, Limited, which carried on business in the State of New York, being incorporated pursuant to Chapter 611 of the State laws of 1875. Sect. 21 of the Act provides that: "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof."

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(1) 35 N. Y. 412.
(2) 64 N. Y. 173, 177.
(3) 65 N. Y. 252.
(4) 80 N. Y. 610.
(5) 83 N. Y. 156.
(6) 22 Q. B. D. 425.
(7) 25 Q. B. D. 232.
(8) 70 Maryland Rep. 191.
(9) 33 Maryland Rep. 487.
(10) 101 U. S. (11 Otto.) 188.
(11) 127 U. S. (Sup. Ct.) 265.
(12) 10 Blatchford U. S. (Circ.) 436.
(13) Law Rep. 6 Q. B. 21, 28.
(14) Law Rep. 2 P. C. 193.

The respondent was, in June, 1880, a director, and in that capacity an officer of the company within the meaning of the statute. On the 30th of that month he, along with other officers of the company, signed and verified on oath, as prescribed by sect. 37, a certificate setting forth that the whole capital stock had, at its date, been paid up in cash.

In the year 1883, the appellant instituted a suit against the respondent before the Supreme Court of New York State for the unpaid balance of his loan to the company, alleging that the certificate contained representations which were material and false, and that the respondent had incurred personal responsibility for the debt as provided by sect. 21. The respondent defended the action; but, a verdict having been found against him, the Court, on the 15th of June, 1886, gave final judgment, ordering him to pay to the appellant the sum of $100,240.

Having failed to recover payment, the appellant, in September, 1886, brought an action upon his decree in the Common Pleas Division of the High Court of Justice for the Province of Ontario, where the respondent resided. The only plea stated in defence was to the effect that the judgment sued on was for a penalty inflicted by the municipal law of New York; and that the action being one of a penal character ought not to be entertained by the Courts of a foreign State.

Mr. Justice Street, who tried the case, being of opinion that the enactments of sect. 21 were strictly punitive and not remedial, dismissed the action with costs. The judges of the Appeal Court were equally divided in opinion, the result being that the appeal taken from his decision was dismissed. The Chief Justice (Hagarty) and Mr. Justice Osler were of opinion that the statutory remedy given to the appellant as a creditor of the company being civil only, and not enforceable by the State or by the public, was not a penal matter in the sense of international law. Mr. Justice Burton was of the same opinion, but held himself precluded from giving effect to it for reasons which he thus explains: "The Courts of the State of New York have placed an interpretation upon this particular statute in which I should not have agreed; but those decisions are the law of the State of New York, and with that we are dealing. I am of opinion, therefore, that on that undisputed expert testimony this is a penal statute there, and the judgment obtained upon it cannot be enforced here." In the conclusion thus stated, Mr. Justice Maclennan expressed his concurrence. But the learned judge, in that respect agreeing with the Court of First Instance and differing from the other members of the Court of Appeal, held that the enactment was in itself undoubtedly penal, inasmuch as it was "passed in the public interest, providing a punishment for an offence," and that "it makes no difference that what it exacts from the offender is given to persons who are ordinary creditors of a company in payment of their respective debts."

Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the Courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court whose jurisdiction is invoked. Judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The Court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a Court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal.

The general law upon this point has been correctly stated by Mr. Justice Story in his "Conflict of Laws," and by other text writers; but their Lordships do not think it necessary to quote from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when these have their origin in a foreign country. The rule has its foundation in the well-recognised principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the Courts of any other country.

Their Lordships have already indicated that, in their opinion, the phrase "penal actions," which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic forum, does not afford an accurate definition. In its ordinary acceptation, the word "penal" may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. The phrase was used by Lord Loughborough and by Mr. Justice Buller in a well-known case (*Folliott* v. *Ogden* (1), and *Ogden* v. *Folliott* (2)), and also by Chief Justice Marshall, who, in *The Antelope* (3), thus stated the rule with no less brevity than force: "The Courts of no country execute the penal laws of another." Read in the light of the context, the language used by these eminent lawyers is quite intelligible, because they were dealing with the consequences of violations of public law and order, which were unmistakably of a criminal complexion. But the expressions "penal" and "penalty," when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the State in the interest of the community, or by private persons in their own interest.

(1) 1 H. Bl. 135. (2) 3 T. R. 734. (3) 10 Wheaton, 123.

The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin* v. *the Pelican Insurance Company* (1). By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon corporations carrying on business under it who failed to comply with one of its enactments. The penalty was recoverable by the commissioner of insurance, an official entrusted with the administration of the Act in the public interest, one half of it being payable into the State Treasury, and the other to the commissioner, who was to defray the costs of prosecution. It was held that the penalty could not be enforced by the Federal Court, or the judiciary of any other State. In delivering the judgment of the bench, Mr. Justice Gray, after referring to the text books, and the *dictum* by Chief Justice Marshall already cited, went on to say: "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, *but to all suits in favour of the State* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community.

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(1) 127 U. S. (20 Davis) 265.

The New York Statute of 1875 provides for the organization and regulation of corporations formed for the purpose of carrying on all kinds of lawful business with the exception of certain branches therein specified. It confers rights and privileges upon persons who choose to form a trading association, and to become incorporated under its provisions, with full or with limited liability; and, in either case, it varies and limits the rights and remedies which, under the common law, would have been available to creditors of the association, as against its individual members. On the other hand, for the protection of those members of the public who may deal with the corporation, the Act imposes upon its directors and officers various stringent obligations, the plain object of which is to make known, from time to time, to all concerned, the true condition of its finances. Thus they are required (sect. 18) to publish an annual report stating the amount of capital, the proportion actually paid in, the amount and nature of existing assets and debts, the names of the shareholders and the dividends, if any, declared since last report; and (sect. 37) to certify the amount of capital stock paid in within thirty days after payment of the last instalment. In both cases the consequence of the report or certificate being false in any material representation, is that every director or officer who vouched its accuracy becomes, under sect. 21, liable personally for all the debts of the corporation contracted during his period of office.

The provisions of sect. 21 are in striking contrast to the enactments of sect. 34, which inflicts a penalty of $100 upon every director or officer of a corporation with limited liability, who authorises or permits the omission of the word "limited" from its seal, official publications, or business documents. In that case, the penalty is recoverable "in the name of the people of the State of New York by the district attorney of the county in which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such county." It does not admit of doubt that an action by the district attorney would be a suit in favour of the State, and that neither the penalty, nor the decree of a New York Court for its amount, could be enforced in a foreign country.

In one aspect of them, the provisions of sect. 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial. To use the language of Mr. Justice Osler, they give "a civil remedy only to creditors whose rights the conduct of the company's officers may have been calculated to injure, and which is not enforceable by the State or the public." In the opinion of their Lordships, these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors.

A number of American authorities were cited in the course of the argument, which may be briefly noticed, seeing that they were made the subject of comment in both Courts below. With one exception, they do not appear to their Lordships to have a direct or material bearing upon the point raised in this appeal.

In *Steam Engine Company* v. *Hubbard* (1) the facts were these. The law of Connecticut, in the event of the president and secretary of a corporation intentionally neglecting to issue a certain certificate, made them jointly and severally liable "for all debts contracted during the period of such neglect." Under that provision an action was brought by a creditor of the corporation against its president, for a debt contracted before the period of neglect began, which remained unpaid during its continuance. There was no question as to enforcing the claim in another State. The Supreme Court of the States held that the enactment was penal, and, therefore, to be strictly construed; and also that the president was not liable, inasmuch as the debt was not contracted during the period of his default. The decision appears to be absolutely right; but their Lordships apprehend that the canon of construction applied in that case would be equally applicable to the case of penalty stipulated by bond, or in a mercantile contract.

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(1) 101 U. S. (11 Otto.) 188.

Flash v. *Conn* (1), another decision of the Supreme Federal Court, was relied on by the appellant. In that case a New York Statute of 1848 had provided that, until the whole capital stock of the corporation was paid up, every stockholder should be liable to its creditors to an amount equal to the amount of stock held by them. It was decided that the claim of a creditor under that provision was contractual and not penal, and might therefore be enforced by an action at law. The result appears to be inevitable, because the liability was not imposed in respect of failure to perform any duty prescribed by the Act; but it throws no light upon the present question.

The respondent, in his argument, placed great reliance upon *Merchants' Bank* v. *Bliss* (2), which was decided in 1866. The statute of 1848, already referred to, required the trustees of the corporation to make a report at a stated period, and, in the event of their failure to do so, rendered them jointly and severally liable for all its debts then existing, or which might be contracted before the report was actually made. The suit was by a creditor against a defaulting trustee, and the only question raised was this—whether the action was for a "liability created by statute, other than penalty or forfeiture," within the meaning of the Statute of Limitations, or "for a penalty or forfeiture, when action is given to the party aggrieved"? The Supreme Court of New York decided that the liability belonged to the second category, and that suit was consequently barred by the lapse of three years. In another case, *Wiles* v. *Suydam* (3), the same Court held that a similar claim by a creditor, being for a statutory penalty or forfeiture, could not be joined in a declaration with a claim upon contract. Their Lordships see no reason to question the propriety of these decisions, but

(1) 109 U. S. (2 Davis) 371.

(2) 35 N. Y. (8 Tiffany), 412.

(3) 64 N. Y. 173.

it is hardly necessary to say that a delict may give rise to a purely civil remedy, as well as to criminal punishment. Although a right of action is given to the party aggrieved, it does not follow that the law of nations must regard his action as a suit in favour of the State.

Attrill v. *Huntington* (1) is, however, an authority upon the very point raised in this appeal. During the dependence of the present action, the appellant preferred a bill in equity, before the Supreme Court of the State of Maryland, to set aside certain transfers of stock by the respondent, upon the allegation that they were fraudulently made in order to defeat his claims under the decree of June, 1886. The primary judge granted the relief craved, but the Court of Appeal, by a majority of five judges against two, reversed his decision and dismissed the bill, holding that the decree, being for a penalty, could not be enforced beyond the limits of the State of New York. Their Lordships are constrained to differ from the reasons assigned by Mr. Justice Bryan in delivering the judgment of the majority, which do not appear to them sufficiently to recognize the distinction, from an international point of view, between a suit for penalty by a private individual in his own interest, and a suit brought by the government or people of a state for the vindication of public law. The distinction is clearly pointed out in the opinion of the dissentient judges as expressed by Mr. Justice Stone, in whose reasoning their Lordships concur.

Being of opinion that the present action is not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the State of New York, for punishment of an offence against their municipal law, their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to give decree in favour of the appellant, with costs in both Courts below. The appellant must have the costs of this appeal.

Solicitors for appellant: *Freshfields & Williams.*
Solicitors for respondent: *Harrison & Powell.*

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(1) 70 Maryland, 191.

[PRIVY COUNCIL.]

J. C.*

1892

Nov. 24, 25.

1893

Feb. 11.

JAMES . . . . DEFENDANT;

AND

STEVENSON AND OTHERS . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Victoria Transfer of Land Statute—Certificates—Easement—Evidence to shew Abandonment.

In an action by the respondents to assert a right of way which had been granted by the appellant's predecessor by deed in 1839 over his land, and along the boundary which divided land retained by him from land conveyed to the respondents' predecessor, the appellant pleaded that it had been abandoned:—

Held, that abandonment being a question of intention, non-user by the respondents, coupled with user by the appellant for farm purposes, of portions of land, subject to the easement, when the easement was not required, could not prove an abandonment of the entire right, and were inconclusive to prove an abandonment of portions thereof:

Held, that the omission in the appellant's and respondents' certificates of title to their respective lands under the Transfer of Land Statute to record the easement, did not bar the respondents' claim or relieve the servient tenement of its liability.

APPEAL from a decision of the Supreme Court (Dec. 2, 1889), and from a judgment entered for the respondents in pursuance thereof by Williams, J. (Dec. 18, 1889).

The facts are stated in the judgment of their Lordships.

Finlay, Q.C., and *Tindal Atkinson*, for the appellant, contended that on the evidence the right of way claimed was not proved to exist on the parcel of land in dispute. Even if the easement is held to have been created, it has been extinguished by abandonment, and by various acts of the respondents and their predecessors in title. The respondents' rights, moreover, are concluded by the certificates of title respectively issued to them and to the appellant under the Transfer of Land Statute, both of which are silent as to the alleged easement; whereas, if the easement had continued to exist at the date of those certificates it ought to have been, and would have been, recited therein. See sects. 47, 49, 50 of No. 301 to Act 42 Vict. No. 610, and 49 Vict. No. 872, s. 41. Reference was made to *Scott* v. *Shire of Eltham* (1); *Small* v. *Glen* (2).

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* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, LORD SHAND, SIR RICHARD COUCH, and SIR EDWARD FRY.

W. Graham (with him, Sir *Horace Davey*, Q.C.), for the respondents, contended that their title to the right of way was established by the evidence. Its position and the position of the ground over which such right of way existed was determined by long user thereof by the respondents and their predecessors in title. The certificates of title, at least, shewed the boundaries of the lands respectively belonging to either party. The appellant, therefore, could not dispute that the position of the way claimed by the respondents was on their western boundary and on his eastern. Though the certificates were silent as to the right claimed and the incumbrance imposed, there was nothing in the Transfer of Land Statute and its amending Acts to bar or extinguish the respondents' claim, or to render the silence of the certificates conclusive on the subject. The way was never made as a road. Though there was evidence that the respondents had not in earlier years used the way, that was because there was no necessity to use it. On rare occasions, when its use was required, it was not abandoned. Since 1875 there had been open user in assertion of right. The evidence entirely failed to prove any possession or enjoyment by the appellant, adverse to such user, or any intention on the part of the respondents to abandon their claim. Abandonment is a question of intention, to be decided on the particular facts: see *Crossley & Sons, Limited* v. *Lightowler* (3).

Atkinson, replied.

The judgment of their Lordships was delivered by

1893
Feb. 11.

SIR EDWARD FRY:—

The respondents are the owners and occupiers of a piece of land, part of a Crown grant, portion No. 1, in the parish of

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(1) 2 Vict. L. R. (L.) 98.

(2) 6 Vict. L. R. (L.) 154.

(3) Law Rep. 3 Eq. 279; S.C. 2 Ch. 478.

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Keelbundora, county of Bourke, in the Colony of Victoria. They were plaintiffs in the action.

The appellant, who was the defendant, is the owner of a piece of land adjoining the plaintiffs' land to the west, which was included in the same Crown grant.

The action was brought to assert a right to a way along the western side of the boundary, which divides the lands of the litigant parties.

The Crown grant, under which both parties claim, bore date the 31st of January, 1839, and was made to Thomas Walker. The land granted was bounded on the south by the Yarra Yarra River; on the west by a creek known as Darebin Creek; on the north by a section line, dividing portion No. 1 from portion No. 3; and on the east by a similar line dividing portion No. 1 from portion No. 2.

By indentures of lease and release, bearing date respectively the 7th and 8th of June, 1839, the Crown grantee, Thomas Walker, conveyed to George Brunswick Smyth, the predecessor in title of the plaintiffs, a part of the same portion No. 1. It was described as bounded on the east by the original eastern boundary of this portion, being a line commencing at the Yarra Yarra River, and running 132 chains in a northerly direction; on the north by the marked sectional line bearing west 29 chains from the north-eastern point; on the west by a line of road, 1 chain in width, "the use of which," says the release, "is hereby also released and conveyed," and bearing south from the north-western point to the Yarra Yarra River; and on the south by that river. The deed further describes the land as "containing by admeasurement in or about 374½ acres, be the same more or less." Then follows a grant of the road before mentioned, in these words: "With a right of road or way, 1 chain in breadth, in, through, and out of the same, and commencing at or about the north-western point of the said portion of land hereby released, or intended so to be, and running in a southerly direction to the Yarra Yarra River." The plan on the deed, which is referred to in the grants as containing a more particular description and delineation of the property granted, shews distinctly a road leading from the Yarra Yarra River to the north-west point of the land conveyed, along the western boundary of that land, but on the land retained by the vendor, Thomas Walker. On the plan the road is marked "reserved road," which is, no doubt, inappropriate language; and the words "in, through, and out of the same," contained in the description of the road in the release, are not very intelligible; but no doubt exists in their Lordships' minds as to the effect of the deed as a grant by Walker to Smyth of a right of road over the land retained by Walker along its eastern boundary.

It should be added that the release further reserved to Walker a right of way across the land released, in a direction east and west; this way was subsequently dedicated to the public, and is known as the Lower Heidelberg Road.

The plaintiffs claim under Smyth, the grantee of the right of way; the defendant claims under Walker, the grantor.

It is the common case of both parties that, at the date of the release of 1839, there was no fence existing between the land conveyed to Smyth and the land retained by Walker.

When this action was begun in the year 1888, and when the trial took place, the condition of the properties was as follows: they were intersected by several public roads; first, beginning towards the south by the Lower Heidelberg Road, running in a general east and west direction along the line of way reserved by the release of 1839; next, by the Melbourne and Heidelberg Railway, running from S.W. to N.E.; next, by the Upper Heidelberg Road, having a general direction of S.W. to N.E.; and, lastly, by a road to Eltham with a somewhat more northerly trend; the northern boundary of the plot was then skirted by a public road known as Banksia Road.

Except where these public roads intervened, the whole western side of the plaintiffs' land was divided from the defendant's land by an ancient wooden fence, which was shewn to have been there as long ago as the year 1842, which extended from the Yarra Yarra River to the north-west corner of the land in Banksia Road. Along this western fence from the Yarra Yarra River northward, to the Lower Heidelberg Road, there was no visible track; nor was any user of a road there shewn, except upon one occasion, when the plaintiffs' predecessor was doing

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repairs to the fence; but at the north-west corner of the defendant's land in the Lower Heidelberg Road there was a gate which, so far as appears, was ordinarily left open. From the Lower Heidelberg Road northward, as far as the Eltham Road, along the eastern side of the defendant's land, and by the side of the ancient fence, there was a road which appears to have been in existence as far back as the evidence goes, and to have been used as a private road by the plaintiffs and their predecessors. From the Eltham Road northward to Banksia Road no track existed; no gates are shewn to have been inserted in the fences, which were wooden ones, and no user is shewn.

The right of the plaintiffs to use the private road between the Lower Heidelberg Road and the Eltham Road is not in question; the dispute relates to rights of way claimed over the pieces of land respectively south and north of this private way, and in direct continuation of it.

It was in the first place contended, that the true western boundary of the land conveyed to Smyth, in 1839, was different from the existing line of fence; that the real line of division began on the north-west corner, at a point to the west of the end of the actual fence, and terminated at the south-west corner on the river at a point considerably east of the southern end of the existing fence, from which it was contended that the way claimed was essentially different from the way granted.

But it is to be observed, that the existing fence has been in its present situation for upwards of forty years; that no legal origin can be shewn to this fence, except the boundary drawn by the release of 1839; that in like manner the private road between the Lower Heidelberg and the Eltham public roads runs along the side of this wooden fence; that no legal origin can be shewn to this road except the grant of a right of way contained in the same deed; and that the possession and enjoyment of the lands of the plaintiffs and defendant are, at the present time, and have probably, since 1839, or very soon after, been determined and regulated by the existing fence. In such circumstances there arises, in the judgment of their Lordships, a very cogent presumption in favour of the existing fence being on the line intended and expressed by the deed of conveyance by the predecessors in title of the defendant to the predecessors in title of the plaintiffs—a presumption not to be displaced, if at all, unless by the most conclusive evidence of error in the actual position of the fence. In the present case, their Lordships are not convinced that there is any such error; the eastern fence, as it actually existed, is stated in the evidence to have been "a little wavy" in its course, but in the plan which is set forward as demonstrating the error it is a straight line; the deed of 1839 describes the eastern boundary as running 132 chains in a northerly direction; the plan above mentioned draws it northwards 180·01 chains. In the deed the northern boundary is described as bearing west—language which does not necessitate its being drawn due west. In the plan used to demonstrate the error, a distance of twenty-nine chains on a somewhat arched line is measured from a point near the south-eastern corner of the plot to ascertain the western boundary on the Yarra Yarra River, and there is nothing which appears to justify this particular method of measurement. Lastly, it is not shewn whether the plot bounded by the line now put forward as the true one has precisely the same limits on the Yarra Yarra River as are indicated on the original release, nor whether it includes the 374½ acres mentioned in the release of 1839, or more or less than that quantity. In their Lordships' opinion the presumption that the existing fence is the true boundary of the properties, according to the rights of the parties as ascertained by the release of 1839, is not rebutted, and consequently they are of opinion that the way claimed by the plaintiffs is along the strip of land subjected to the easement by that deed.

It has, in the next place, been contended at the bar, that the right of way has been abandoned. This is a question of intention to be decided upon the facts of each particular case, as was expressly laid down in the case of *Crossley & Sons* v. *Lightowler* (1). There can be no question of the abandonment of the entire right of way granted in 1839, because an important part of it has been and is used by the plaintiffs without disturbance; the only question can be, whether the northern and southern continuations of that road have been abandoned. Now, the only facts which can be relied on by the defendant in the present case are, the absence of user of the northern part of the way; the absence of gates in the fences of that part of the land; the absence of user of the southern right of way by the plaintiffs and their predecessors, except on one occasion in 1872, when it appears that materials for the repair of the fence were carted under the direction of the agent of Stevenson, a predecessor of the plaintiffs, through the gate in the Lower Heidelberg Road, and down the west side of the fence; and the user by the defendant and his predecessors, for farm purposes, of the portions of the land over which the roads in question would pass. But these facts are, in their Lordships' judgment, insufficient to shew any intention to abandon the right of way. It does not appear that occupants of the plaintiffs' land have ever had any occasion to use the northern part of the way, or the southern part, except once, and then they did so use it; and to have required gates to be inserted in the wooden fence at Banksia Road and the road to Eltham, when the way was not wanted for use, would have been an unreasonable act, the omission of which cannot be construed as the expression of an intention to abandon the right of way. Nor is the occupation for agricultural purposes of the strips of land subject to the easement, when the easement was not wanted, in the opinion of their Lordships a conclusive circumstance. It is worthy of notice, in reference to this question of abandonment, that ever since the year 1875 the plaintiffs have distinctly asserted their right to the way which they now claim, and if in the earlier period there is no evidence of such assertion, it must not be forgotten that it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it.

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(1) Law Rep. 2 Ch. 478.

Lastly, a contention was raised by the defendant, based upon the provisions of the Transfer of Land Statute. On the 27th of March, 1886, two certificates of title under that statute were issued to the defendant in respect of portions of his land in question, and contained no notice of any right of way over any part of this land. On the 5th of June, 1888, two certificates of title were issued to the plaintiffs, which stated their right over the private road between the Lower Heidelberg and Eltham Roads, but were silent as to any rights of way to the north and south of this private road. It is contended that the legal effect of these certificates was to extinguish the plaintiffs' right of way if it ever existed. This contention is, in their Lordships' judgment, untenable. The 49th section of the Transfer of Land Statute provides that land included in any certificate of title shall be deemed to be subject to any easement subsisting over it. The subsequent legislation on the subject has not, in their Lordships' judgment, interfered with this provision. The amending Act, No. 610, by sect. 2 makes a certificate of title which certifies that the person named therein is entitled to an easement conclusive evidence that he is so entitled; but it does not make such certificate the only evidence admissible. The 41st section of the subsequent amending Act, No. 872, requires the registrar to specify upon the certificate as an incumbrance affecting the land including in it any subsisting easement affecting the same which shall appear to have been created by deed or writing; but their Lordships agree with the judgment of the Full Court of Victoria, that "the omission by the registrar to enter the easement as an incumbrance on the certificate of the servient tenement, under this provision, would not relieve the servient tenement of its liability." In like manner the omission of the registrar to state on the certificates granted to the plaintiffs the existence of the rights of way they claim is no bar to that claim.

These observations dispose of all the points presented to their Lordships at the bar, and for the reasons given they will humbly advise Her Majesty that this appeal be dismissed with costs.

Solicitors for appellant: *Crawford & Chester.*
Solicitor for respondents: *J. Harwood.*

[PRIVY COUNCIL.]

J. C.*
1892
Dec. 9, 10, 11.
1893
March 4.

BRYANT, POWIS, AND BRYANT, LIMITED DEFENDANT;

AND

LA BANQUE DU PEUPLE . . . . . PLAINTIFF.

BRYANT, POWIS, AND BRYANT, LIMITED DEFENDANT;

AND

THE QUEBEC BANK . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC (APPEAL SIDE).

Principal and Agent—Effect of Power of Attorney—Power to Borrow must be express—Indorsement of Bills "per pro."

Held, that an agent who is authorized by his power to make contracts of sale and purchase, charter vessels, and employ servants, and as incidental thereto to do certain specified acts, including indorsement of bills and other acts for the purposes therein aforesaid, but not including the borrowing of money, cannot borrow on behalf of his principal or bind him by contract of loan, such acts not being necessary for the declared purposes of the power.

Where an agent accepts or indorses "per pro" the taker of a bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority; where an agent has such authority, his abuse of it does not affect a *bonâ-fide* holder for value.

THESE two appeals were heard consecutively. The first was from a decree of the Court of Queen's Bench (Oct. 6, 1891), reversing a decree of the Superior Court, district of Quebec (Feb. 6, 1891), and condemning the appellant to pay to the respondent $37,000 with interest and costs.

The facts are not in dispute, and are stated in the judgment of their Lordships.

The suit was based upon two promissory notes made by Smith, Wade, & Co. to the order of the appellant, and indorsed by Davies in its name, purporting to sign as its agent. The notes were pledged by Davies with the bank as collateral security for a loan to himself.

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* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, LORD SHAND, and SIR RICHARD COUCH.

The Superior Court held that Davies's power of attorney was in force at the date of the indorsement, but that by its terms no authority was given to him to borrow money or to contract loans, and, consequently, there was no authority to pledge the promissory notes. The Appellate Court by a majority decided that he had such authority.

Hall, Q.C., and *Hollams*, contended that the appellant was not bound by Davies's indorsement and pledge of the notes in question, and that such transactions were beyond the scope of his authority. The evidence shewed that Davies ceased to be the appellant's salaried manager on the 1st of January, 1888, and commenced business on his own account. It was contended that thereupon the power whatever its construction ceased to be operative. The notes sued on were pledged by Davies to the respondent bank as collateral security for a balance of a loan which he had previously obtained from it, and to secure which he had pledged other similar documents. The manager of the respondent bank knew that Davies had ceased to have dealings with him in the name of the appellant and was in business on his own account. He made no inquiries and never inspected the power of attorney. It was contended that the power on its true construction gave no authority to borrow money, or to pledge or transfer notes or other documents as security for repayment of money when borrowed. The authority conferred by the power was special and not general, and did not extend to authorize borrowing either in express terms or by reasonable or necessary implication. Reference was made to *Castle* v. *Baby* (1); *Churchill* v. *Mackay* (2), decided since this case was before the Appeal Court; and *Jonmenjoy Coondoo* v. *Watson* (3).

Fullarton, Q.C., and *Chase Casgrain* (Attorney-General for Quebec), for the respondent, contended that Davies, when he indorsed the notes in question, acted as the agent of the appellant

(1) 5 Low. Can. Rep. 411.

(2) 20 Sup. Ct. Rep. pp. 472, 476.

(3) 9 App. Cas. 561.

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1893

BRYANT, POWIS, & BRYANT v. LA BANQUE DU PEUPLE.
BRYANT, POWIS, & BRYANT v. QUEBEC BANK.

and within the scope of his authority. On the true construction of the power of attorney his authority was not confined to the specific acts mentioned, but extended to all acts ejusdem generis, and generally to indorse, transfer, and negotiate all promissory notes, and to pledge and deposit them as collateral security for loans. The respondent was a holder of the notes in good faith for value. Davies had been entrusted by the appellant with the notes, and was held out by the appellant as a person having authority to indorse and pledge them. Reference was made to *Bank of Bengal* v. *M'Leod* (1). [LORD MACNAGHTEN referred to *Attwood* v. *Munnings* (2), to shew that powers of attorney must be construed strictly.] *Jonmenjoy Coondoo* v. *Watson* (3); *Montaignac* v. *Shitta* (4); *Withington* v. *Herring* (5). With regard to construing a power strictly or benevolently, see *Topper* v. *Smith* (6). It was not contended that French law differed from English law upon this subject; but Troplong on Mandat, Nos. 604, 605, and Pothier, Mandat, sects. 87, 88 and 89, were referred to. The sections of the Civil Code for Lower Canada bearing on the question were 1701, 1703, 1704, 1716, 1719, 1727, et seq.; also 2278.

Hall, Q.C., replied.

The second appeal was from a decree of the same Court of Queen's Bench (Oct. 6, 1891), affirming a decree of the Superior Court (February 6, 1891), whereby the appellant was condemned to pay $7411, part of the total claimed, with interest on the total from the 23rd of August, 1890, and on the balance decreed from the 5th of September, 1890.

The action was brought on two bills of exchange for 1000*l.* drawn by J. S. Murphy & Co., and indorsed before acceptance by J. S. Murphy & Co. and by Davies in the appellant's name and acting as its agent.

The question in this appeal, as in the other, was mainly as to the authority of Davies to bind the appellant by his indorsement.

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(1) 7 Moo. P. C. 35, 38.
(2) 7 B. & C. 278.
(3) 9 App. Cas. 561, 569.
(4) 15 App. Cas. 357.
(5) 5 Bing. 442.
(6) 1 Patent Cas. (1884) 89.

Hall, Q.C., and *Hollams*, for the appellant, referred to Civil Code of Lower Canada, arts. 2281 and 2311; *Merritt* v. *Lynch* (1); *Attwood* v. *Munnings* (2); *Stagg* v. *Elliott* (3); *Grant* v. *Norway* (4); *Smith* v. *Macguire* (5).

Stuart, Q.C. (of the Quebec bar), and *Vesey Fitzgerald*, for the respondent, referred to *Lewis* v. *Ramsdale* (6); *Withington* v. *Herring* (7); *Perry* v. *Holl* (8); *Jonmenjoy Coondoo* v. *Watson* (9); Story on Agency, sect. 443.

Hall, Q.C., replied.

The judgment of their Lordships was delivered by

1893 March 4.

LORD MACNAGHTEN:—

The appellant in these appeals is a company, incorporated with limited liability under the statute of the United Kingdom known as the Companies Act, 1862. It was formed in 1885 for the purpose of taking over the business of the firm of Messrs. Bryant, Powis, & Bryant, of London, Quebec, and Montreal, lumber merchants.

On the 1st of January, 1888, the company discontinued the business of buying and shipping timber, which up to that time it had carried on in Quebec in succession to the firm of Bryant, Powis, & Bryant, and thenceforth the company restricted its business in Quebec to making advances on the security of lumber and timber, principally if not solely in connection with the operations of a firm of lumber merchants trading as Smith, Wade & Co.

On the formation of the company one Charles Griffiths Davies, of Quebec, who had been agent and attorney for the firm of Bryant, Powis, & Bryant, was appointed the agent and attorney of the company in Canada. The appointment was contained in a power of attorney, bearing date the 25th of November, 1885.

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(1) 9 Low. Can. Rep. 353.
(2) 7 B. & C. 278.
(3) 12 C. B. (N.S.) 373.
(4) 10 C. B. 665.
(5) 3 H. & N. 554.
(6) 55 L. T. (N.S.) 179.
(7) 5 Bing. 442.
(8) 2 L. T. (N.S.) 585.
(9) 9 App. Cas. 569.

Davies remained in the regular employment of the company at a fixed salary up to the 1st of January, 1888. He then went into business on his own account, and carried on business as broker and general commission and shipping agent, under the style of "C. G. Davies & Co." But he still acted for the company when occasion required, receiving commission for his services. His power of attorney was not revoked or withdrawn, and the company continued to hold him out as their agent.

In February, 1890, Davies left Quebec under the pressure of pecuniary difficulties. It was then discovered that he had taken advantage of his position as agent and attorney for the company to procure money on the credit of the company for his own private purposes. The company in consequence found itself exposed to heavy and unexpected demands, and there was a good deal of litigation, in the course of which various points were raised, depending on the special circumstances of the particular case. That litigation has given rise to these two appeals, which their Lordships will now proceed to consider separately.

BRYANT, POWIS, AND BRYANT, LIMITED *v.* LA BANQUE DU PEUPLE.

In the appeal of *Bryant, Powis, and Bryant, Limited* v. *La Banque du Peuple* the question is whether the company is to be charged with moneys obtained by Davies for his own purposes, but borrowed by him in the name of the company and professedly on their behalf.

The facts are not in dispute. On the 1st of October, 1889, Davies went to the bank, who had been at one time, but who were not then, the bankers of the company, and asked the manager, M. Dumoulin, for a loan of $25,000 on account of the company, saying that it was required for the purpose of a remittance to be made by him on that day to the head office in London. The manager consented to make the advance on what is termed a "short loan." Davies drew a cheque on the bank in the name of the company, "per pro C. G. Davies," for $25,000. The cheque was paid as an overdraft, and as collateral security for its repayment Davies deposited with the bank three promissory notes, amounting together to $40,000, drawn by Smith,

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Wade & Co., in favour of Bryant, Powis, and Bryant, Limited, and indorsed in their name, "per pro C. G. Davies."

On the 5th of the same month Davies went to the bank again, and told the manager that he found that the sum of $25,000 more was required, and thereupon he obtained a further loan to that amount. The transaction was carried out in precisely the same manner as the former loan, and by way of collateral security Davies indorsed and deposited three further promissory notes of Smith, Wade & Co., amounting together to $35,000.

Before the 4th of December, 1889, Davies paid the bank out of his own moneys $10,000 in reduction of the loan. On that day the six promissory notes, which then had become due, but had not been presented for payment, were returned to Davies, who gave in exchange two other promissory notes for $25,000 each, dated the 28th of September, 1889, and made by Smith, Wade & Co. to the order of the company, and indorsed in the name of the company, "per pro C. G. Davies."

For these notes Davies took the following receipt:—

"Quebec,
"4th December, 1889.

"Received of Messrs. Bryant, Powis, and Bryant (Limited) through their agent here the following bills payable as collateral security for the payment of loan of ($37,000) thirty-seven thousand dollars with interest at 7 per cent., viz.:—

	$
"S. W. & Co. p. note due 31st March . .	25,000
"S. W. & Co. p. note due 31st March . .	25,000
	"50,000

"p. Auguste Labardie,
"pro Manager Banque du Peuple,
"Quebec."

Before the two notes became due the company forbade Smith, Wade & Co. to pay the bank, and they also gave notice to the bank disclaiming liability, and calling upon the bank to hand over the notes to them.

When the notes fell due the bank brought this action upon them against Smith, Wade & Co. and the company. Smith, Wade & Co. submitted themselves to the judgment of the Court. The company disputed their liability on various grounds, and they also filed an incidental demand, claiming the promissory notes in question as their property.

The case came on to be heard before Andrews, J. The learned judge in an able and elaborate judgment decided in favour of the company, on the ground that the bank had notice that Davies was acting under a limited authority, and that the power of attorney of the 25th of November, 1885, from which alone Davies derived his authority, did not authorize him to borrow money in the name of the company.

The other grounds upon which the company resisted the claim of the bank were rejected by the learned Judge. As the argument before their Lordships was substantially confined to the question of authority, it is not necessary to allude to them, beyond saying that in the course of the discussion the learned counsel for the appellant very properly disclaimed in express and unqualified terms any imputation of want of good faith on the part of the bank or on the part of M. Dumoulin.

On appeal, the Court of Queen's Bench for Lower Canada, by a majority of three to two, reversed the decision of Andrews, J., and condemned the company to pay to the bank the sum of $37,000 with interest from the 31st of March, 1890, and costs of suit.

The learned judges who formed the minority in the Court of Appeal adopted and relied upon the judgment of Andrews, J. The views of the majority are expressed in the formal judgment pronounced by Cross, J. That judgment proceeds upon the ground that "the specific powers" granted to Davies by the power of attorney "did not necessarily imply the negation of the powers of general agency granted to and exercised by the said Charles G. Davies under the said power of attorney," and that the words used in the concluding part of the power of attorney, which are quoted in the judgment, and which will be considered presently, "refer not specially to said special powers, but to the business generally of the respondents" (i.e., Bryant, Powis, and Bryant, Limited), "and by their terms give the said

Charles G. Davies a discretion to do, execute, and perform any matter or thing which in the opinion of the said Charles G. Davies ought to have been done or performed in or about business of the respondents, therefore outside and beyond what had been otherwise provided for by the said power of attorney," and consequently that Davies had power to bind the company "and did so bind them by his endorsation in their name of said promissory notes and drawing the money advanced thereon."

On the appeal before this Board the learned counsel for the appellant did not seriously dispute the proposition that the words "per pro," in the acceptance or indorsement of a bill of exchange or promissory note amount to an express statement that the party so accepting or indorsing the bill or note has only a special and limited authority, and therefore, that a person who takes a bill or note so accepted or indorsed is bound at his peril to inquire into the extent of the agent's authority: *Stagg* v. *Elliot* (1). Nor was it disputed that powers of attorney are to be construed strictly—that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. It was pointed out, indeed, that the decisions on which the learned counsel for the appellant mainly relied in support of these propositions were decisions of English judges, but it was not shewn that there is any difference in this respect between the law of Canada and the law of England. The provisions of the Civil Code of Lower Canada, and the Canadian authorities which were cited to their Lordships, appear to be in harmony with English law and English authorities.

In the result the argument was reduced to a consideration of the true construction and effect of the power of attorney of the 25th of November, 1885. It will therefore be necessary to state its provisions somewhat in detail.

That instrument begins by reciting the formation of the company, "to undertake and carry on as successors to Messrs. W.

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(1) 12 C. B. (N.S.) 373–81, per Byles, J.

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Bryant, F. C. Bryant, and H. W. Powis, who were the founders of the company, the trade and business of wood and timber importers, brokers, merchants and dealers, then carried on by them in partnership together at London, Quebec, Montreal, and elsewhere, under the name or style of Bryant, Powis, & Bryant, and for other purposes more particularly mentioned in the memorandum of association of the company." It then recites the provisions of the articles of association authorizing the appointment of an attorney, and proceeds as follows: "And whereas the directors deem it desirable in the interest of the company to appoint an agent and attorney to represent the company in Canada aforesaid now know ye that the company doth hereby appoint Charles Griffiths Davies of Desprairie Street, in the city of Quebec, Canada, aforesaid to be the true and lawful attorney of the company, for and in the name on behalf of the company to enter into any contract or engagement for the purchase or sale of goods and merchandise of whatever nature or kind, and for the charter and recharter of any ships or vessels, and for the engagement of all such agents, clerks, and servants as may be necessary for carrying on and conducting the business of the said company, and to draw and sign cheques on the bankers for the time being of the said company, and to draw, accept, and indorse bills of exchange, promissory notes, bills of lading, delivery orders, dock warrants, coupons, bought and sold notes, contract notes, charter parties, accounts, current accounts, sales, and other documents which shall in the opinion of the said attorney require the signature or indorsement of the company and also" to sue for and recover debts, to demand and obtain delivery of goods belonging to the company, and generally to act for the company in and about the recovery of debts and the delivery of goods in all respects as fully and effectually as the company could itself do, to give receipts, to bring and defend and compromise actions; "also to enter into, make, sign, seal, execute, deliver, acknowledge and perform any contract, agreement, deed, writing, or thing that may in the opinion of the said agent or attorney be necessary or proper to be entered into, made, signed, sealed, executed, delivered, acknowledged, or performed for effectuating the purposes aforesaid or any of them and for all or any of the purposes aforesaid to use the name of the company"—then follow the words quoted in the judgment of the Court of Appeal: "*and to do execute and perform any other act matter or thing whatsoever which ought to be done executed or performed or which in the opinion of the said agent or attorney ought to have been done executed or performed in or about the business affairs of the company.*"

To put it shortly, the power of attorney authorized Davies to enter into contracts or engagements for three specified purposes: (1.) the purchase or sale of goods; (2.) the chartering of vessels; and, (3.) the employment of agents and servants; and as incidental thereto, or consequential thereon, to do certain specified acts and other acts of the same kind as those specified. If the instrument be read fairly, it does not, in their Lordships' opinion, authorize the attorney to borrow money on behalf of the company, or to bind the company by a contract of loan. It appears to their Lordships that the words quoted in the judgment of the Court of Queen's Bench are to be read in connection with the introductory words of the sentence to which they belong, "for all or any of the purposes aforesaid." So read, the words in question do not confer upon the agent powers at large, but only such powers as may be necessary, in addition to those previously specified, to carry into effect the declared purposes of the power of attorney.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed, and the judgment of Mr. Justice Andrews restored. The respondents will pay the costs of the appeal to the Court of Queen's Bench and the costs of this appeal.

BRYANT, POWIS AND BRYANT, LIMITED *v.* QUEBEC BANK.

The question raised in the appeal of *Bryant, Powis, and Bryant, Limited* v. *Quebec Bank* may be disposed of very shortly.

The appeal is from a decision of the Court of Queen's Bench for Lower Canada affirming the decision of Mr. Justice Andrews, who held the company liable to the bank in respect of two bills of exchange indorsed in the name of the company, "per pro

C. G. Davies," and discounted by the bank in the ordinary course of business.

In the discussion at the bar it was conceded by the learned counsel for the appellant that the bank were bonâ fide holders for value; and the argument, as in the previous case, was substantially confined to the question of Davies's authority.

The authority of Davies as the agent and attorney of the company was derived from the power of attorney of the 25th of November, 1885, which has been fully stated already. That instrument in terms authorizes the attorney to indorse bills of exchange. Their Lordships agree with Andrews, J., that the fact that Davies abused his authority and betrayed his trust cannot affect bonâ fide holders for value of negotiable instruments indorsed by him apparently in accordance with his authority.

The law appears to their Lordships to be very well stated in the Court of Appeal of the State of New York, in *President, &c., of the Westfield Bank* v. *Cornen* (1), cited by Andrews, J., in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows:—

"Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts aliunde. The apparent authority is the real authority."

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed with costs.

Solicitors for Bryant, Powis, and Bryant, Limited: *Wilson, Bristows, & Carpmael.*

Solicitors for La Banque du Peuple: *Bompas, Bischoff & Co.*

Solicitors for the Quebec Bank: *Ashurst, Morris & Co.*

(1) 37 N. Y. R. (10 Tiff.) 322.

[PRIVY COUNCIL.]

J. C.*
1893
Feb. 24.

COMMERCIAL BANK OF AUSTRALIA, LIMITED . . . . } APPELLANTS;

AND

OFFICIAL ASSIGNEE OF THE ESTATE OF JOHN WILSON & COMPANY . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

IN BANKRUPTCY.

Construction of Agreement—Proof of Debt in Bankruptcy—Payment to suspense Account with creditor not a Discharge.

Where a bankrupt and others had become guarantors to the appellants of a principal debtor's liability for the sum of £6250, and three of the guarantors thereafter entered into agreement with the appellants that their liability should be limited in this way, that there should be substituted for it a deposit of £3000 in the bank, to be carried to a suspense account, with power to the appellants to appropriate that sum whenever they thought fit in discharge pro tanto of the principal debt:—

Held, that such deposit did not until appropriation operate as payment, and that the appellants were entitled to prove for the full amount of their debt against the estate of a bankrupt co-surety, who was not a party to the above agreement.

APPEAL from an order of the Supreme Court in Bankruptcy (Dec. 23, 1891), affirming by a majority an order of the Judge in Bankruptcy, that the proof of debt against the bankrupt estate should be reduced from £6250 to £3250.

The facts are stated in the judgment of their Lordships.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the appellants, contended that the agreement between the bank and the three co-sureties was a lawful and valid agreement. It effected the intention of the parties. That intention was not to reduce the indebtedness of the principal debtor to the bank, but to reduce the guaranteeing liability of each of the three sureties to £1000.

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and THE HON. GEORGE DENMAN.

The bank agreed to accept in lieu of the personal liability of each of the three co-sureties the security of a deposit by him of £1000, which should be carried to suspense account. The bank, no doubt, was to have power to appropriate these sums in payment of the principal debt; but until it did so, they remained to the credit of a suspense account, and were merely security and not payment. The decision of the Supreme Court that the £3000 must be deducted from the bank's proof is contrary to the terms of the agreement, and defeats its declared intention. Reference was made to *Ex parte Leary* (1).

Byrne, Q.C., and *Sargant*, contended that the transaction between the co-sureties and the bank amounted to a payment in fact of £3000. Consequently only the balance remained due, and that was all that the bank could prove for in the bankruptcy. Even if this view should not prevail in favour of Wilson, at all events it should prevail in favour of his assignee in bankruptcy. The bank should in justice to the creditors of the bankrupt be called on to appropriate the money actually in its hands in discharge of the debt due to it. The transaction amounted to a realization by the appellant of the sum of £3000 in respect of the guarantee; if it did not do so before appropriation, yet Wilson's assignee, as between Wilson and his co-sureties, was entitled to have the moneys applied in reduction of the sum guaranteed.

Reference was made to *Ex parte Todd* (2); *Ex parte Caldicott* (3); *Ward* v. *North Bank of New Zealand* (4); *Pearl* v. *Deacon* (5).

Cozens-Hardy, Q.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR :—

The sole question for determination in this case is whether the appellants, the Commercial Bank of Australia, are entitled to prove against the estate of the bankrupt John Wilson for the sum of £6250 or £3250.

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(1) 6 Ves. 644.

(2) 2 Rose, 202, note.

(3) 25 Ch. D. 716.

(4) 8 App. Cas. 755.

(5) 24 Beav. 186; S.C. 1 De G. & J. 461.

The question turns upon the construction of an agreement entered into in the year 1890 between the appellants and three persons, O'Connor, Hart, and Freehill, who with others, including Wilson, had become guarantors to the bank for the discharge of a liability incurred or to be incurred by Her Majesty's Theatre and Grand Opera House Company of Sydney, Limited. The parties to the guarantees were not in all cases the same, but nothing turns on that. After reciting the several guarantees that had been entered into, the agreement further recites that Hart and Freehill had offered and proposed to pay to the said bank the sum of £2000 in discharge of their respective individual liabilities under the said joint and several guarantees, and that O'Connor had offered and proposed to pay £500, and to give the bank his promissory notes for a further sum of £500 in discharge of his individual liability under the joint and several guarantees. The agreement further recites that the bank had "declined to receive the said moneys in reduction of the said account,"—that is the account due by the principal debtor, Her Majesty's Theatre and Grand Opera House Company, Limited—"but have agreed with the said Francis Bede Freehill, James N. Hart, and Daniel O'Connor, that they will not look to them for more than £1000 each, on condition that the same sums or their equivalent shall be deposited to a separate account with the said bank, to be appropriated by the said bank in satisfaction, in part or in whole, of the said debt of Her Majesty's Theatre and Opera House Company, Limited, when and so soon as the said bank may deem prudent, the receipt of such sums to be entirely without prejudice to the bank's right to sue or look to the other guarantors for the full amount of the said guarantees, it being understood that such moneys shall be and remain as a security to the bank for the due payment of the said respective sums of £1000 each, credited to a special suspense account with the said bank accordingly." Then the agreement witnesses "that, in pursuance of the said agreement, and in consideration of the sum of £2000, paid by the said James N. Hart and Francis Bede Freehill, and £500, together with the said promissory notes, paid by the said Daniel O'Connor, at or before the execution hereof to the credit of a suspense account with the said bank (receipt whereof is hereby acknowledged), the said bank both hereby release and discharge the said Daniel O'Connor, James N. Hart and Francis Bede Freehill, their heirs, executors, and administrators, respectively, of, from, and against all debts, claims and demands whatever of the said bank against them, the said Daniel O'Connor, James N. Hart and Francis Bede Freehill, under and by virtue of their said joint and several guarantees and all actions, suits, or causes of action in respect thereof. Provided nevertheless and these presents are executed upon this express condition, that nothing herein contained shall release, or be construed or operated to release, the said Daniel O'Connor in the event of either or any of the said promissory notes being dishonoured, or to release or in any manner to prejudice or affect any claim or demand which the said bank has or ever had upon or against the said John Shepherd, John Wilson, or James Allison,"—(who were the co-guarantors)—or either of them, or their or either of their respective estates and effects."

There can be no doubt that the object of the bank in not receiving this sum in discharge of the account due by the principal debtor was to preserve their right, if it could lawfully be done, to prove against the estate of any of the co-sureties who might become bankrupt. The contention on behalf of the respondent in support of the judgment below, which was dissented from by the Chief Justice, has been first, that the effect of the agreement, to which their Lordships have directed attention, was to operate as payment of the principal debt pro tanto, and that therefore £3000 of the debt having been in fact discharged there could be no proof except for the balance; and, secondly, that even if it was not to be regarded as payment, supposing the question had arisen between Wilson and the bank, yet Wilson being bankrupt and his estate in process of distribution amongst his creditors, an arrangement of this description could not prevail to affect the right of the assignee in bankruptcy, and consequently that in the bankruptcy the bank could prove for no more than the balance.

The agreement it is said amounted to a payment. The question is whether it amounted to payment of a part of the principal debt; because unless it did the principal debt still remains, and not having been in any part discharged, the bank are entitled to prove for it against the estate of the surety. Their Lordships have pointed out that it certainly was the intention of the parties to this agreement that the principal debt should not be discharged. It is said that this has nevertheless been done in spite of the intention of the parties. Their Lordships are unable to agree that that is so. The arrangement which the agreement embodies appears to their Lordships to amount to this—that the liability of the guarantors who were dealt with by that agreement should, in lieu of their personal liability to pay the entire sum guaranteed in case of default of the principal debtor, be as between them and the bank limited in this way, that there should be substituted for it the deposit in the bank of a sum of money less than the whole amount, but which should afford a complete security to the bank quoad the amount to which it extended. Accordingly the sum of £3000—taking the promissory notes, they having been paid, as equivalent to cash—was deposited in the bank to a suspense account. The bank no doubt had power when it thought it prudent to do so to appropriate that sum to the payment of the principal debt pro tanto, and as soon as they made such appropriation it would undoubtedly operate as payment. They never have made such appropriation. The question is whether prior to appropriation it operated as payment of the debt. Their Lordships are unable to see why it should do so. The money was put to a special account called a suspense account, presumably in the names of these guarantors who had paid it in. At all events it was ear-marked as a special account. Down to the time of appropriation by the bank of this amount their Lordships are unable to see anything which could discharge the principal debtor. If that debtor had come and tendered the entire amount due, the bank would have been neither justified, as it appears to their Lordships, in saying, nor bound to say that, £3000 of the amount having been already paid, all that they were in a position to receive was the residue. Upon the whole of the terms of the agreement there appears to be nothing more than a substitution of a certain sum of money deposited in the bank as security, in lieu of the personal liability of guarantors which down to that time had rested upon these persons who were parties to the agreement with the bank.

Apart, therefore, from any question arising out of the bankruptcy, their Lordships cannot think that the carrying out of such an arrangement as this in any way affected the liability of Wilson, the co-surety, for the total amount of the debt due to the bank.

But then it is said that, Wilson having become bankrupt, and the question being one affecting his creditors, this agreement must be regarded in their favour as a payment, and that otherwise it would be an evasion of the bankruptcy law. Their Lordships are unable to concur in this view. Supposing that no such agreement as this had been entered into, the creditors of Wilson would have been in no better position than if this agreement is held to have the effect contended for by the appellants. How, then, can a transaction, which does not prejudice the position of the creditors, but which leaves their position exactly what it would have been if there had been no such agreement, be said to be an evasion of the bankruptcy law? Their Lordships find it difficult to understand the proposition when so stated; and in their opinion upon the true view of the agreement and its consequences, that is really what the contention on the part of the respondent amounts to. The truth is that the fallacy which lurks in the argument of the respondent is this, that it is suggested that the comparison is to be between the position of the creditors of Wilson if no such agreement had been entered into, and the position of the creditors of Wilson if they can claim the benefit of this sum as a payment. No doubt, if they can so claim the benefit of it as a payment, their position would be better than it would have been if there had been no agreement; but in their Lordships' opinion, for the purpose of seeing whether the agreement on its true construction (and their Lordships have already pointed out what in their view is the true construction) is, or would effect, an evasion of the bankruptcy law, the comparison must and can only be made between the position of the creditors without any agreement, and the position of the creditors supposing the agreement to have been entered into and

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to be construed as their Lordships have held it must be construed.

For these reasons their Lordships find themselves unable to concur in the judgments arrived at by the Courts below, and they will humbly advise Her Majesty that the appeal should be allowed, that the judgments below should be reversed, and that it be declared that the appellants are entitled to prove under the bankruptcy for the amount of the full sum of £6250, without making deduction of the sum of £3000. The respondent must pay the costs in the Courts below and of this appeal.

Solicitors for appellants: *Want & Co.*
Solicitor for respondent: *G. P. Slade.*

[PRIVY COUNCIL.]

PRESIDENT, COUNCILLORS, AND RATEPAYERS OF COLAC . . . . } DEFENDANTS;

AND

SUMMERFIELD . . . . PLAINTIFF.

J. C.*
1893
Feb. 15; *March* 24.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Local Government Act, 1874, *s.* 384—*Compensation for Damage Past and Future.*

By the true construction of sect. 384 of the Local Government Act, 1874, when a ditch or drain has been made in virtue of its powers, an owner or occupier injuriously affected is entitled to compensation for damages to his land assessed once for all, present and prospective, irrespective of whether those powers have been negligently or properly exercised.

APPEAL from an order of the Supreme Court (Dec. 14, 1888) refusing an application by the appellants for a new trial. The facts are stated in the judgment of their Lordships.

Willis, Q.C., and *Bremner*, for the appellants.

Finlay, Q.C., and *Muir Mackenzie*, for the respondent.

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* *Present*:—LORD WATSON, LORD HOBHOUSE, and LORD MORRIS.

The following cases were referred to: *Geddis* v. *Proprietors of Bann Reservoir* (1); *Hammersmith and City Railway Company* v. *Brand* (2); *Cowper Essex* v. *Local Board for Acton* (3).

The judgment of their Lordships was delivered by

LORD WATSON:—

The appellants are the municipal authority for the shire of Colac, under the provisions of the Local Government Act, 1874, which is No. 506 of the Public General Statutes of the Colony of Victoria. By sect. 384, they are authorized, inter alia, to make and keep open such ditches, drains, and watercourses as to them may seem fit, in and through any lands adjoining or lying near to any street or road within the municipal district. The same clause expressly provides that they shall "make compensation to the owners and occupiers of any lands for any damage which they may sustain through the exercise of any of the powers conferred by this section."

The respondent is owner and occupier of a parcel of land in the district of Colac, which abuts upon a road under the charge of the appellants. His land slopes downwards from the road in the direction of a salt lake; but between it and the lake there is interposed another block of ground belonging to one Armstrong.

In the year 1871 the appellants cut a ditch, or open drain, through the eastmost part of the respondent's land, from the road to his march with Armstrong. Water artificially collected was conveyed by that drain, and discharged upon Armstrong's land until 1881, when, in consequence of complaints made by the respondent, it was filled up, and a new watercourse constructed along the side of the road. With that arrangement the respondent had no fault to find; but it was altered in 1886, when the appellants re-opened the old drain, and at the same time extended it for some distance into Armstrong's block.

This action was brought by the respondent for recovery of compensation, in respect of (1.) damage to his land between

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(1) 3 App. Cas. 430.

(2) Law Rep. 4 H. L. 171.

(3) 14 App. Cas. 153.

1871 and 1881, and (2.) damage sustained and to be sustained by reason of the appellants' operations in 1886. The first of these claims was withdrawn and need not be further noticed. In his statement of claim the respondent alleged that the appellants' drain of 1886 had occasioned serious injury to his land, and also that it was improperly and unskilfully designed and negligently constructed. It is obvious, from the course which the case took at the trial, and in the proceedings which followed upon verdict, that these averments of negligence and want of skill were simply intended to aggravate damages, by shewing that the works had not been planned or executed in the best manner for avoiding injury to his land; and that they were not put forward by the respondent, or understood by the appellants, as raising any plea to the effect that the latter had exceeded their statutory powers.

The action was tried before A'Beckett, J., and a jury. The respondent's evidence was directed to prove that compensation was due, in respect of (1.) soil occupied by the drain, (2.) damage already sustained from flooding of his land, and (3.) damage yet to be sustained from similar causes. It went to shew that water escaped from both sides of the drain, and also that some of the water discharged upon the surface of Armstrong's block found its way to and prejudicially affected a considerable area of low-lying land at the south-west corner of the respondent's block. According to the appellants' evidence, the damage, if any, was inappreciable. The respondent's witnesses assessed compensation on the footing that the injury arising from the drain would be permanent. It was for the appellants to say whether, in the event of the jury being of opinion that their works were injurious, they would remove them, or take measures to prevent future damage. Their counsel were referred to in the course of the trial, and refused to give any undertaking of that kind. The jury were therefore entitled to assume, and in all probability they did assume, that any injury to the respondent's land such as had been already sustained would be continued.

The learned judge submitted two questions to the jury, (1.) whether there was negligence by the appellants in the design and construction of the drain, and, (2.) what amount of compensation was due for loss of land occupied by the drain, for damage, if any, sustained in the past, and for damage, if any, by reason of future depreciation in the value of the land. The jury answered the first question in the affirmative; and, in reply to the second, assessed damages at £824. All questions, other than that of damages, were reserved for the decision of the presiding judge.

Parties were subsequently heard upon the effect of these findings before A'Beckett, J., who ordered that judgment should be entered for the respondent for £824. The learned judge held that the finding of the jury upon the question of negligence, which he submitted to them at the request of the respondent's counsel, was immaterial. He was of opinion that "the matter was one on which the council had properly exercised its discretion, although it had apparently adopted the inferior system": and accordingly that the finding of the jury with respect to negligence was wrong, but that it did not affect their verdict upon the question of damage.

The appellants thereupon gave notice of motion for a new trial, upon eight specific grounds. Six of these relate exclusively to directions which the presiding judge was said to have failed to give, and to directions which he ought to have given to the jury, with reference to the principles upon which they should estimate damage. It is unnecessary to notice them in detail, because not one of them was relied on in the argument addressed to this board. The remaining grounds upon which the motion was based were, (1.) that the findings of the jury were against evidence, and the weight of evidence, and (2.) that damages were excessive. No exception was taken to the presiding judge having submitted to the jury the question of damage by future depreciation.

The case then came before the full Court, who refused the appellants' motion, but varied the terms of the judgment entered for the respondent, for the purpose of making it clear that the sum decreed included compensation for prospective as well as past damage.

In this appeal, their Lordships were asked to recall the judgments of both Courts below, and to remit the cause for new trial, mainly upon two grounds, neither of which is to be found in the appellants' notice of motion, or is referred to in the opinions of the learned judges. Shortly stated, the first of these was that the respondent could not recover statutory compensation, because the jury's finding of negligence conclusively shewed that the works which occasioned damage to his property were not constructed and maintained, in the exercise of the powers conferred upon the appellants by sect. 384 of the Local Government Act. The second ground was that the respondent could not recover prospective damages by way of compensation, but must raise a new action at law, from time to time, for the recovery of such damage as it accrues.

It would be sufficient for the disposal of this appeal to say that the pleas upon which it was maintained travel beyond the record, and ought not to be entertained by this tribunal. But, parties having been heard upon them, their Lordships do not hesitate to state that, in their opinion, these pleas, even if competently raised, could not avail the appellants.

As to the first of them, their Lordships think it is very plain that, by his averments of negligence, the respondent did not intend to charge, and was not understood to charge the appellants with excess of their statutory powers; and that the jury, by their verdict, only meant to affirm that the appellants, if they had seen fit to do so, might have so planned and executed their works as to occasion less injury to the respondent's land. In the Courts below, the case, from first to last, was conducted upon the footing that what the appellants had done was done in the exercise of the powers conferred upon them by sect. 384. So long as they act within their statutory powers, negligence is, in any question of compensation, immaterial, and cannot affect the extent of their liability, which is for all damage resulting from the construction or maintenance of their works.

The second plea, to the effect that the respondent cannot sue for compensation in respect of future damage, was supported in argument by a reference to *Geddis* v. *Proprietors of the Bann Reservoir* (1), and other well-known English authorities. The principle of these decisions is simple and intelligible; but it

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(1) 3 App. Cas. 430.

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President, Councillors, and Ratepayers of Colac
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rests upon the construction of statutory enactments, which bear no analogy whatever to the provisions of sect. 384 of the Victorian statute, upon which the claim of the respondent is based. He is entitled to recover compensation, not only for past but for future damage, if sect. 384, according to its true construction, so provides. Their Lordships have no hesitation in holding, with the learned judges in the Courts below, that it does so provide. The language of the clause appears to them to indicate plainly the intention of the Legislature that, when a ditch or drain has been made in virtue of its powers, an owner or occupier injuriously affected shall be entitled to have compensation for damage to his land assessed once for all, and shall not be compelled to raise an action yearly, or it may be weekly, for damage subsequently accruing.

Some argument was addressed to their Lordships in support of the motion for a new trial in respect of damages being excessive. Upon such a question their Lordships would, in any circumstances, hesitate to disturb the unanimous decision of the Full Court. In this case, although the award of damages is a liberal one, their Lordships are of opinion that it is mainly due to the conduct of the appellants themselves; and, that in view of the position which they choose to assume at the trial, its amount is not unreasonable.

Their Lordships will humbly advise Her Majesty that the judgment of the Full Court ought to be affirmed, and this appeal dismissed. The appellants must pay to the respondent his costs of this appeal.

Solicitors for the appellants: *Ashurst, Morris, Crisp & Co.*
Solicitor for the respondent: *J. Harwood.*

[PRIVY COUNCIL.]

MOHIDEEN HADJIAR . . . . PLAINTIFF;

AND

PITCHEY . . . . DEFENDANT.

J. C.*
1893
April 29.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Practice—Plaintiff's right to Appeal—Appealable Amount—Mesne Profits.

The measure of value for determining a plaintiff's right of appeal is the amount for which the defendant has successfully resisted a decree. Mesne profits, if demanded by the plaint, must enter into the calculation of the appealable value.

THIS was a petition for special leave to appeal. The Supreme Court had refused leave on the ground that the value of the property in dispute was Rs.4050, and that the amount of mesne profits sued for was mere speculation, and could not be added to the value of the property, in respect of which the suit had been dismissed.

It appeared that the libel or plaint filed on the 22nd of August, 1889, had prayed to recover property valued at Rs.4050 with Rs.360 mesne profits due at the date of the suit, and Rs.60, a month's mesne profits thereafter, till possession was recovered, making the total appealable amount at the date of the Supreme Court's decree, viz., the 14th of August, 1891, Rs.5850, exclusive of interest and costs.

Cowell, for petitioner, submitted that though there was no direct authority reported on this particular point, the defendant's right to appeal, if the plaintiff had recovered the full amount claimed, would have been clear, and therefore, the plaintiff had a similar right as he had failed. The appealable amount was the amount in respect of which his suit had been dismissed, which included the mesne profits, and that, on the date of final decree, was above the limit of Rs.5000, prescribed by sect. 42 of

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* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and HON. G. DENMAN.

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Ordinance 1 of 1889. Reference was made to *Allan* v. *Pratt* (1); *Bank of New South Wales* v. *Owston* (2); *Mussumat Ameena Khatoon* v. *Radhabenod Misser* (3).

Their Lordships granted the application.

Solicitors for the petitioner: *Parker, Garrett & Parker.*

[PRIVY COUNCIL.]

J. C.*
1892
Nov. 23, 30.
1893
March 4.

RICKETSON . . . . APPELLANT;

AND

BARBOUR . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Lands Acts, 1861, 1875, 1880 *and* 1884—*Reserved Lands—Revocation of Reserve—Rights of Improver—Sale by Appraisement.*

Held, that although the Lands Act of 1880, sect. 12, rendered improved lands conditionally purchaseable, yet the proviso to that section on its true construction preserved as against claims by conditional purchasers the right of the Governor under sect. 2 of the Lands Acts Amendment Act, 1875, to sell by appraisement and without competition to the improving tenant any improved reserved land the improvements on which were made before the reservation or before the 1st of July, 1876.

Where such application by the improver had been made while the lands were still reserved from sale under the Act of 1861, *held,* that such application was valid (regard being had to sect. 3, sub-sect. 2, of the Crown Lands Act, 1884), and operated as a continuing offer until after the reserve was revoked on the 14th of December, 1889, and the Governor, acting under sect. 2 of the Act of 1875, accepted such offer on the 4th of February, 1890.

Sect. 102 of the Act of 1884 does not apply to lands reserved from sale under the previous Acts, and therefore the acceptance by the Governor of the appellant's offer was not invalid by reason of sixty days not having expired from the date of the reservation having been revoked.

APPEAL from an order of the Supreme Court (May 27, 1891), affirming a decision of the Land Court by which it was held,

* *Present:*—The Lord Chancellor, Lord Hobhouse, Lord Macnaghten, Lord Hannen, Lord Shand, and Sir Richard Couch.

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(1) 13 App. Cas. 780.
(2) 4 App. Cas. 270.
(3) 7 Moore's Ind. Ap. Ca. 261.

that at the time of certain applications by the respondent for a conditional purchase and a conditional lease of certain lands vested in Her Majesty, such lands had not been lawfully contracted to be granted to the appellant, and were therefore Crown lands open to conditional sale and lease.

The question decided in the appeal was whether at the date of the respondent's application there was a valid and binding agreement between the appellant and the Government for the sale to the appellant of the lands to which those applications related at a price to be fixed by appraisement, exclusive of the value of improvements made by the appellant.

The proceedings in the case are stated in the judgment of their Lordships.

The decision involved the consideration and construction of the following statutes of the Legislature of New South Wales, which are hereafter referred to by the year in which they were passed: (1.) 25 Vict. No. 1 (Crown Lands Alienation Act, 1861), ss. 1, 3, 4, 6, 13; (2.) 39 Vict. No. 13 (Crown Lands Amendment Act, 1875), ss. 2, 4, 5, 34; (3.) 43 Vict. No. 29 (Lands Act Further Amendment Act, 1880), ss. 12, 13, 21; (4.) 48 Vict. No. 18 (Crown Lands Act of 1884), ss. 2, 4, 102; (5.) "Crown Lands Titles and Reservations Validation Act of 1886," s. 8; (6.) 53 Vict. No. 21 (Crown Lands Act of 1889), s. 39. This last Act came into force on the 1st of December, 1889.

Sir *John Rigby*, S.G. and *Sargant*, for the appellant, contended that temporary reservations from sale under sect. 4 of the Act of 1861 were in effect merely reservations against the claim of the conditional purchaser or free selector to purchase, not against the right of the Governor in Council to sell by appraisement if he thought fit; and that therefore a sale by appraisement might be validly made even while the land remained under temporary reserve from sale, or at any rate directly the reservation was revoked. But, even if a sale by appraisement might not take place till after an interval from the revocation of the reserve, the interval in this instance had expired before the 4th of February, 1890 (fifty-one days from the revocation of the reserve), since under sect. 102 of the Act of 1884, and sect. 8 of the Act of 1886, the statutory interval in the case of reserves made under the Acts prior to 1884 is thirty days only, not sixty days as in the case of reserves under the Act of 1884 and the subsequent Acts. And even though the statutory interval applicable to this case should be held to be sixty days, the acceptance of the Governor was a continuing acceptance from the 4th of February, onwards, and the sixty days interval expired on the 13th of February, so that there was a complete contract seven days before the application of the respondent on the 20th of February.

But, assuming that there was in fact no concluded contract between the Governor and the appellant at the time when the respondent made his application, the case nevertheless falls within the express proviso to sect. 12 of the Act of 1880. That Act was the first that threw open to free selectors land which had been temporarily reserved from sale and the revocation of which had been afterwards revoked. The effect of this would have been to place at the mercy of the conditional purchaser not merely unimproved land, but land on which improvements had been made either during the reserve, and before this legislation was proposed or even before the reserve; and this would in many cases have worked great hardship on improving tenants. The clear object of the proviso was therefore to preserve in the case of certain improved land the previously existing power of the Governor to sell by appraisement to the improving tenant in priority to the claim by the free selector. In the view taken by the Supreme Court the 12th section and the application of the respondent under it did "prevent the Governor from selling by appraisement" to the appellant.

The Court below has gone too far in treating the application by the appellant as a mere nullity. An application may be made and be a valid one, though at the date of the application there is no present power to accept it. There is nothing in the Act of 1884 to prejudice the rights of the applicant, which are expressly saved under sect. 2 of that Act, his application having been made in or about 1878 or 1880.

Pollard, for the respondent, contended that the judgment of the Supreme Court was right. At the time when the appellant's application was made to purchase the lands in question, such lands could not lawfully be sold or otherwise disposed of by the Governor in council. The 2nd section of the Act of 1875 does not empower the sale of all Crown lands, although the terms of that section are general. Crown lands temporarily reserved from sale are not included in its scope. It would render legislation entirely inconsistent with itself, if by one set of provisions land is to be deemed reserved from sale, and then by another set of provisions it is to be deemed saleable notwithstanding such reservation. The general words must, according to the usual canon of construction, be restricted in accordance with the obvious intention and meaning of the section, and in that view land reserved from sale cannot be legally sold till the revocation of the reserve. As regards the 12th section of the Act of 1880 so much relied on by the appellant, previous to that year improved lands were not open to conditional purchase. This section was intended to throw open to free selectors lands temporarily reserved, after the revocation of the reserve. But it was contended that the proviso did not give any power not previously possessed, and that it was clear that the Governor did not possess the power of selling lands which were reserved from sale. What it means is this, that although improved reserved lands may after revocation of the reserve be conditionally purchased, yet such land may still be sold by appraisement under sect. 2 of the Act of 1875. The whole section is governed by the words "whenever the temporary reservation of any lands shall be revoked." The application by the appellant was invalid in the first instance, having been made for land which the governor could not sell. Every part of the transaction, if it is to stand, must take place after the land is open for purchase. Consequently the acceptance on the 4th of February, 1890, was an acceptance of an invalid offer, and was inoperative. In this way there was nothing to prevent the respondent from becoming a purchaser and lessee under his application of the 20th of February, 1890.

The Solicitor General, replied.

1893. March 4. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

This is an appeal from a judgment of the Supreme Court of New South Wales, confirming the decision of the Land Court of that Colony upon a case stated by it.

On the 20th of February, 1890, the respondent, Robert Barbour, made two applications, one for a conditional purchase, the other for a conditional lease of certain lands which formed part of the reserve made under the Crown Lands Alienation Act of 1861. The special case which bears date the 21st of October, 1890, states that:—"Some ten or twelve years ago, one Henry Ricketson (the appellant), a grazier, on whose holding the reserve was situate, made applications to purchase the lands in question, by virtue of improvements." The case contains further this statement:—"For the purposes of this case it is assumed that the said Henry Ricketson was entitled to make such applications, and that the same were duly made." In the judgment of the Supreme Court it is stated that either prior to the date of the reservation, or at any rate before the 1st of July, 1876, Ricketson, who was the holder of the lease of the run on which the reserve was situated, had fully improved the land. Whether this was an inference from the statement in the special case which their Lordships have quoted, or was an admission made in the course of the argument, is immaterial; it must be taken to be the fact. On the 14th of December, 1889, notice of the revocation of the reserve was published in the *Government Gazette*. Thirty days from this notice expired in the month of January, 1890, sixty days on the 13th of February, 1890. On the 4th of February, 1890, the Governor in Council approved of the appellant's applications to purchase, and this approval was notified in the *Gazette* of the 25th of February following.

On the 20th of February the respondent made the applications already referred to. It was held by the Land Court, and this decision was affirmed by the Supreme Court, that on the day of the respondent's application the lands in question were Crown lands, open to conditional purchase or conditional lease, and that the respondent was therefore in a position to insist that his application should be granted.

The determination of the question which has arisen depends upon the construction of various provisions in Acts which have been passed by the Legislature of New South Wales relating to Crown Lands. It will be necessary to consider somewhat minutely the terms of these provisions.

By the third section of the Crown Lands Alienation Act, 1861, it is provided as follows:—

"3. Any Crown Lands may lawfully be granted in fee simple or dedicated to any public purpose under and subject to the provisions of this Act, but not otherwise. And the Governor, with the advice of the Executive Council, is hereby authorized in the name and on the behalf of Her Majesty so to grant or dedicate any Crown Lands."

Under sect. 4 the Governor, with the advice of the Executive Council, might, by notice in the *Gazette*, declare what lands should be reserved from sale until surveyed for the preservation of water supply or other public purposes. Land to which this description applies is afterwards referred to as land temporarily reserved from sale.

By sect. 6 it is provided that "after any land shall have been temporarily reserved from sale the same shall not be sold or otherwise disposed of until such reservation shall be revoked by the Governor with the advice aforesaid, and the notice of such revocation published in the *Gazette*."

By sect. 8 the Governor was empowered, with the advice of his Council, upon application by the holder of any lease or promise of lease of Crown Lands containing improvements made previously to the expiration of such lease, to sell and grant such lands to the owner of such improvements without competition in fee simple, at a price to be fixed by appraisement.

By sect. 13, lands not containing improvements were to be open for conditional sale in the manner provided by the section, which entitled an applicant for conditional purchase upon the prescribed terms if there were no other applicant to be declared the conditional purchaser.

The Crown Lands Act of 1875 repealed, amongst other provisions, sect. 8 of the Act of 1861. By sect. 2, however, the provisions of the repealed section, so far as they are material to the present case, were re-enacted.

It was contended by the learned counsel for the appellant that upon the true construction of the Act of 1861, as amended by the Act of 1875, it was competent for the Governor, with the advice of his Council, to sell improved land by appraisement to the holder, notwithstanding that it had been temporarily reserved from sale, and that such reservation had not been revoked. Although the argument is not without plausibility, owing to the language to be found in certain parts of the Acts, their Lordships concur with the Court below in thinking that it is not well founded.

Under these earlier Acts the only land open for conditional sale by competition was unimproved land. The Lands Act of 1880 made a change in this respect. Sect. 12 provided that whenever the temporary reservation of any lands should be revoked by the Governor, the land upon which any improvements of not less than 20*s.* per acre in value were made might, notwithstanding their existence, be conditionally purchased. That section, however, contained this important proviso: "Provided that nothing in this clause shall prevent the Governor from selling by appraisement any improved reserved land, the improvements upon which were made before the reservation thereof, or before the 1st day of July, 1876."

In considering the effect of this proviso, it is necessary to bear in mind that the second section of the Act of 1875 was not repealed or in terms modified by the Act of 1880, and that the section just quoted enacts only that reserved land "may," when the reservation is revoked, be conditionally purchased. Supposing there were no applicant for such purchase, it would be difficult to contend that, notwithstanding the Act of 1880, the Governor, with the advice of his Council, could not sell improved land to the holder by appraisement, whether his improvement were made before 1876 or not. What, then, is the meaning of the proviso that nothing in the clause should prevent the Governor from selling by appraisement improved reserved land the improvements on which were made before that date? In their Lordships' opinion it can only have been intended to enable the Governor to sell such land under the second section of the Act of 1875, even though before the contract of sale was complete there was an application for conditional purchase. It was quite natural that, when improved land was for the first time made the subject of conditional purchase, the Legislature should enable the Governor, with the advice of his Council, if it was thought right to do so, to have regard to the claims of those whose improvements had been effected before the given date, to purchase their improved holdings. The reason for fixing the particular date does not appear, but it was not improbably due to the fact that after that date there was reason to anticipate a change of legislation as regards the sale of improved lands.

Their Lordships do not think that in expressing this opinion they are differing from the view entertained by the learned judges in the Court below. Those learned judges, however, thought that the application for purchase under sect. 2 of the Act of 1875 must be in respect of land which might at the time of the application be sold. No reasons are given for this opinion, and their Lordships are unable to agree with it. Their Lordships cannot but entertain grave doubt whether it was open to the Court below to come to the conclusion that the applications of the appellant were invalid, in view of the statement in the special case, that for the purposes thereof it was assumed that the applications for purchase were "duly made." But apart from this, their Lordships fail to see why an application made during the reservation should be invalid.

The application has no effect until accepted, and may until then be withdrawn at pleasure. It is but an offer to purchase made to those who will thereafter have the power to sell. Why should not such an offer be as well made before the time arrives, when the power to sell can be exercised, as after? It is well recognized law that an offer to buy or sell is regarded as a continuing offer down to the time of acceptance, and that upon acceptance there is a complete contract. Supposing that trustees had only power to sell after a certain date, and that before that date an offer to purchase were made to them which was accepted

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after that date, their Lordships cannot doubt that upon acceptance the contract would be complete and valid. There appears to be nothing in the statutes which govern the present case to lead to a different conclusion where the application to purchase reserved land is made before the reservation is revoked. Their Lordships think therefore that in the present case the application was valid, though made pending the reservation, and that the transaction could be validly completed by the governor as soon as the statutory period after revocation of the reservation expired.

If then the case depended only upon the statutes to which reference has already been made, their Lordships are of opinion that it would have to be determined in favour of the appellant, even assuming that the effect of the statute to which attention will presently be called was to substitute sixty for thirty days as the period which must elapse subsequent to revocation of the reservation before the sale could be lawfully effected.

On the 4th of February, 1890, the Governor in Council approved the appellant's application to purchase. If the view which their Lordships have indicated of the effect of the proviso to sect. 12 of the Act of 1880 be correct, the Governor in Council had power, notwithstanding the application of the respondent of the 20th of February, to sell to the appellant under sect. 2 of the Act of 1875, in pursuance of his previous application. But besides this the appellant was, down to the 13th of February, applying to purchase, and the Governor in Council had previously approved the sale to him. Even admitting, then, that there was no power to sell until the 13th of February, and that before that date the appellant could have withdrawn his application to buy and the Governor in Council his acceptance of the offer, it is by no means clear that either could have done so after that date, and that there was not a complete contract therefore prior to the 20th of February. The Land Court held that even if the approval on the 4th of February was valid, that did not in itself establish a contract, as the notice approving the appellant's application "which was the contract" was not published in the *Gazette* until the 25th of February. The case cited in support of this view decided only that the notice in the *Gazette* was evidence of a contract, not that the notice was itself a contract. In their Lordships' opinion, the contract was constituted by the approval of the Governor in Council of the application to buy, and not by the notification of the approval in the *Gazette.*

So far, their Lordships have dealt with the question as if the statutes already referred to had remained unrepealed. But the 1st section of the Crown Lands Act, 1884 (which was passed on the 17th of October, 1884, and did not come into force until the 1st of January, 1885), repealed the prior Acts, subject to certain saving provisions contained in the 2nd section. The repeal was not of itself to prejudice or affect any proceeding, matter, or thing lawfully done or commenced, or contracted to be done under the authority of any enactment or regulation thereby repealed, and all rights accrued and obligations incurred or imposed under or by virtue of any of the repealed enactments were (subject to any express provisions of that Act in relation thereto) to remain unaffected by such repeal.

It is contended that, the application having been made prior to the Act of 1884 coming into operation, the transaction was a matter, proceeding, or thing commenced to be done under the authority of the repealed statutes, and enabled a sale to be proceeded with under those statutes after the 1st of January, 1885. Whatever doubt there might have been on the point, but for the enactment in the 2nd sub-sect. of sect. 3, appears to their Lordships to be entirely removed by that enactment. It provides that:—

"No application to make any purchase of Crown lands in virtue of improvements under the said Acts effected or acquired after the 17th day of July, 1884, shall, unless made for land held under a miner's right or business license, be complied with. Provided that all such first-mentioned applications to purchase under the said repealed Acts shall be lodged with the proper officer before this Act comes into operation."

This clearly declares by implication that an application to purchase lands by virtue of improvements under the repealed Acts can be complied with after the Act of 1884 comes into operation, and indicates that a transaction of purchase by virtue of improvements, if commenced by application prior to the Act, might be completed afterwards. It prohibits, however, compliance with the application in the case of improvements effected or acquired after the 17th of July, 1884, and it provides that all applications, except perhaps in the case of miners, to purchase under the repealed Acts should be lodged with the proper officer before that Act came into operation.

It has been held in the colony that an application to purchase land under the provisions of prior Orders in Council was something lawfully commenced to be done within the meaning of similar words contained in sect. 2 of 25 Vict. (No. 1).

The learned judges, however, were of opinion in the present case that the lodging an application to purchase land which was not then open for sale, and which might never be open for sale, was wholly nugatory, and did not fall within the protection of the 3rd sub-section of sect. 2, as being a proceeding, matter, or thing lawfully commenced.

Their Lordships are unable to concur in the view that an application to purchase reserved land made before the revocation was complete and the land had become open for sale was a nullity. They have already stated their reasons for thinking that a sale by appraisement, made on such an application, would be as valid and effectual as if the application had been made after the reservation had ceased.

No doubt an application to purchase reserved land made before the reservation is at an end is of itself of no force or effect, but this is equally true of an application made after the reservation is at an end, which is of itself no more effectual than the other. In their Lordships' opinion either of them is of equal validity as the initiation of a transaction which can only be completed if the Governor, with the advice of his Council, determines to sell by appraisement.

It is evident that the intention of the Legislature in enacting the provisions contained in the 2nd and 3rd sections of the Act under consideration, though it was not to preserve any vested interests of those who had improved reserved land, for they possessed no such interests, was yet to enable the Governor with the advice of his Council to recognise by selling to them by appraisement the legitimate claim of such persons to consideration.

When the terms of the 2nd sub-section of sect. 3, and the purview of that and the preceding section, are considered, their Lordships cannot think that it was intended by the Legislature to create such a distinction as this, that an application made before the Act came into operation might be complied with if the requisite period after the notice in the *Gazette* expired before that date, but could not be complied with, if, though the notice revoking the reservation had been made before the Act came into operation, the statutory period requisite before sale expired after that day. The apparent intention of the Legislature is, in their Lordships' opinion, better given effect to by holding that an application made before the Act came into operation might be complied with even though the reservation were not then revoked, than by limiting the saving effect of the enactment to applications for the purchase of land which at the time of the application is capable of being immediately sold, and their Lordships do not feel any difficulty in holding the saving provision to be as applicable to the one case as to the other.

Their Lordships have hitherto assumed that it was necessary that sixty days should expire after the reservation had been revoked before the land could be sold. They are, however, not satisfied that this was the case.

It is contended that this is the effect of sect. 102 of the Act of 1884. It is to be observed, however, that the section referred to was applicable only to Crown lands temporarily reserved from sale "under this Act," and therefore does not in terms apply to land reserved from sale under the previous statutes.

It is argued that "the Crown Lands Titles and Reservations Validation Act of 1886" enacted, in effect, that the provisions of sect. 102 should apply to Crown lands reserved pursuant to the repealed Acts. Their Lordships do not think that this is the case. Sect. 8 of that Act provides as follows:—

"Where a reservation of Crown land from sale made pursuant to any of the said repealed Acts has been or shall be revoked by a notification published in the *Gazette* and before the expiration of thirty days from the date of publication of such revocation a further reservation of such Crown land or any part thereof from sale has been or shall be made and notified in the *Gazette*

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such last reservation shall not by reason only of its having been made within such thirty days be deemed to have been invalid. Provided that reservations made pursuant to the repealed Acts shall be held to be and to have been revocable under the 'Crown Lands Act of 1884.'"

The proviso is, of course, the part of the enactment relied on. But that proviso only has the effect of making the reservations under the former Acts revocable under the Act of 1884, and of validating any revocations of them which had been made under that Act. The proviso refers obviously to sect. 101 of the Act of 1884, which enacted that lands reserved under the provisions of that section should be reserved until revoked or altered in like manner. It was manifestly the intention of the Legislature to meet the contention that, inasmuch as the Act of 1884 only provided for revoking or altering reservations made under that Act, there was no power to revoke and no provision for the revocation of reservations made under the repealed Acts, the provisions of which relating to revocation had been repealed. But the proviso does not enact that reservations made pursuant to the repealed Acts should be held to be temporarily reserved from sale under "the Crown Lands Act of 1884," and there is, therefore, nothing in the subsequent enactment to remove the difficulty that sect. 102 is restricted in its operation to lands temporarily reserved from sale under that Act.

The case no doubt presents some difficulty owing to the somewhat complex course of legislation relating to Crown lands in the Colony, but for the reasons given their Lordships think that the land board rightly disallowed the respondent's applications, and that the judgments appealed from must be reserved, and that the respondent must pay the costs of this appeal and in the Courts below, and they will humbly advise Her Majesty accordingly.

Solicitor for appellant: *G. P. Slade.*
Solicitor for respondent: *A. E. Sydney.*

[HOUSE OF LORDS.]

THE OWNERS OF THE "P. CALAND" AND FREIGHT . . . . APPELLANTS;

AND

THE GLAMORGAN STEAMSHIP COMPANY, LIMITED . . . . RESPONDENTS.

H. L. (E.)
1893
Feb. 27.

THE "P. CALAND."

Ship—Admiralty—Collision—"Making way"—Regulations of 1884 *for Preventing Collisions at Sea, Art.* 5 *sub-s.* (*a*), (*c*), (*d*).

This House will not disturb a mere finding of fact in which both the Courts below have concurred, unless it can be clearly shewn that the finding was erroneous.

By art. 5 of the Regulations of 1884 for Preventing Collisions at Sea, sub-s. (*a*), a steamship, "which from any accident is not under command, shall at night carry," in place of the white light, "three red lights in globular lanterns." By sub-s. (*c*) such a steamship, "when making way" through the water, shall carry the side-lights. By sub-s. (*d*) the lights "required to be shewn by this Article are to be taken by other ships as signals that the ship shewing them is not under command, and cannot therefore get out of the way."

Owing to an accident to her machinery, the speed of a steamship was reduced from eleven knots to between four and five knots. She was able to steer, but could not reverse and go astern as quickly as before. She hoisted three red lights in place of the white light and went ahead; but it was found as a fact both in the Admiralty Division and in the Court of Appeal that she did not exhibit her red side-light till the moment when she came into collision with another vessel. The Courts below held that she thus misled the other vessel into the belief that she was stationary, and so caused the collision:—

Held, that as it could not be clearly shewn that the finding of fact as to the red side-light was erroneous, this House would not disturb it.

The decisions of the Admiralty Division ([1891] P. 313) and of the Court of Appeal ([1892] P. 191) affirmed, with observations by Lord Herschell L.C. and Lord Watson as to the circumstances under which a steamship can be said to be "not under command" within the meaning of the regulations.

By Lord Herschell L.C.: This ship being able to make way at between four and five knots, to steer, and to stop and reverse, though less quickly than before, and the danger of the machinery ceasing to work at any moment not being imminent, the ship could not properly be said to be "not under command" within the meaning of the regulations.

APPEAL from a decision of the Court of Appeal (1). The facts were briefly as follows:—

(1) [1892] P. 191.

On the 15th of April, 1891, between 8 P.M. and 9 P.M., the *P. Caland* was steaming up channel through the straits of Dover when an accident happened to the machinery, the effect of which was that her speed was reduced to between four and five knots (her full speed being about eleven knots), and that she took longer to reverse and go astern. The captain, being of opinion that she was too near the Varne shoal to stop and repair the damage, continued his course at from four to five knots; but, considering her to be a disabled ship, hauled down the white masthead light and hoisted three red lights at the masthead, as prescribed by art. 5 of the Regulations of 1884 for Preventing Collisions at Sea for vessels "not under command." Whether the side-lights were also exhibited was a question in dispute, those on board the *P. Caland* alleging that they were. About 9 P.M. the *P. Caland* came into collision with the *Glamorgan* steamship, which was bound down channel. The two vessels were locked together for a considerable time, after which they parted, the *P. Caland* proceeding on her course for about half an hour, when she stopped to repair.

The owners of the *Glamorgan* having brought an action in the Admiralty Division against the owners of the *P. Caland*, the plaintiffs' case was (inter alia) that the *P. Caland* could not be said to be a vessel "not under command" within the meaning of art. 5 of the Regulations of 1884 for the Preventing of Collisions at Sea; that she had therefore infringed that article, and that owing to her having exhibited three red lights at the masthead and no side-light (until the moment of the collision), the *Glamorgan* was misled into supposing that the *P. Caland* was stationary, and manœuvred accordingly. The defendants' case was (inter alia) that the *P. Caland* did exhibit her side-lights, and that those on board the *Glamorgan* must or ought to have seen the red side-light long before the collision; that the *Glamorgan* manœuvred in disregard of the side-light, and was to blame for the collision.

Jeune J., being of opinion that the *P. Caland* was able to get out of the way of other vessels, held that she could not be said to be "not under command" within the meaning of art. 5, and that she was therefore wrong in hoisting the three red lights. He also found as a fact that she did not exhibit the red side-light till the moment of the collision; and he held that having exhibited the three red lights, and not having properly exhibited the red side-light, the *P. Caland* had misled the *Glamorgan* into the belief that she was stationary, and had thus brought about the collision. The learned judge therefore pronounced the *P. Caland* to be alone to blame, and decreed accordingly (1). The Court of Appeal (Lord Esher M.R., Fry and Lopes L.JJ.) affirmed this decree (2).

By art. 5 of the Regulations of 1884 for Preventing Collisions at Sea (3):—

"(*a*) A ship, whether a steamship or a sailing ship, which from any accident is not under command, shall at night carry, in the same position as the white light which steamships are required to carry, and, if a steamship, in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line one over the other, not less than three feet apart, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles;" . . . .

"(*c*) The ships referred to in this article, when not making any way through the water, shall not carry the side-lights, but when making way shall carry them."

"(*d*) The lights . . . . required to be shewn by this article are to be taken by other ships as signals that the ship shewing them is not under command, and cannot therefore get out of the way. The signals to be made by ships in distress and requiring assistance are contained in article 27."

1892. Dec. 8, 9, 12. Sir *R. E. Webster* Q.C. and *F. W. Raikes* (*Pritchard* with them) for the appellants:—

The question whether the *P. Caland* was to blame turns on the construction of art. 5 of the Regulations of 1884 for Preventing Collisions at Sea. The accident to the machinery had so crippled her that she could only steam about three or four knots an hour, could only reverse very slowly, and was so

(1) [1891] P. 313.

(2) [1892] P. 191.

(3) 9 P. D. 249.

disabled that those in charge of her did not know how soon she might be compelled to stop, the danger of the machinery breaking down being imminent. In this state of things the *P. Caland* was justified in hoisting three red lights at the masthead, and exhibiting the side-lights while making way, being a vessel "not under command" within the meaning of art. 5. "Not under command" in that article means not adequately under command for properly obeying the rules. The *P. Caland* was right in her construction of the regulations, but even if she was wrong she incurred no liability, because it was not shewn that the infringement of the regulations contributed or could have contributed to the collision: *The Fanny M. Carvill* (1): *The Duke of Buccleuch* (2). And the captain having bonâ fide come to the conclusion that the machinery was in imminent danger of breaking down, and having exercised reasonable care and skill in the exercise of his judgment, was not to blame if the judgment was erroneous: *The Theodore H. Rand* (3).

Upon the question of the exhibition of the side-lights the probabilities are strongly in favour of the view that the *P. Caland* did exhibit them, and if so it cannot be disputed that the *Glamorgan* manœuvred wrongly and was to blame. For these reasons the decisions below should be reversed and the *Glamorgan* alone held to blame.

Sir *W. Phillimore* and *Holman* for the respondents:—

The principal question is whether or not the *P. Caland* exhibited her side-lights, for if she did not she is clearly alone to blame, whatever view may be taken of art. 5. And that she did not exhibit the red side-light till the moment of the collision not only appears from the evidence but is concluded by the finding of fact by the Courts below. This House will not reverse such a finding of fact unless it can be clearly shewn that it was wrong: *Gray* v. *Turnbull* (4). And the same rule obtains in the Privy Council: *Allen* v. *Quebec Warehouse Company* (5). With respect to the meaning of art. 5, it is quite clear that the *P. Caland* was able, though slowly, "to get out of the way," and was therefore not "a vessel not under command" within the meaning of the regulations. Those regulations imply that to be not under command a ship must be unable to get out of the way. The *P. Caland* therefore infringed art. 5 in hoisting the three red lights, and it is impossible to say that this infringement of the regulations might not have contributed to the collision. But whether she could or could not be properly said to be a vessel not under command, and even assuming that she could, she infringed art. 5 by making way without exhibiting the side-lights and thus misleading the *Glamorgan* into supposing that she was stationary. This is the first case in which a judicial construction has been put upon art. 5; but *The Hibernia* (1); *The Ripon* (2); and *The Dunelm* (3) may be referred to as analogous cases.

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(1) 2 Asp. M. L. C. (N.S.) 565; 13 App. Cas. 455, n.

(2) [1891] A. C. 310.

(3) 12 App. Cas. 247.

(4) Law Rep. 2 H. L., Sc. 53.

(5) 12 App. Cas. 101.

Sir *R. E. Webster* Q.C. in reply:—

In *The Ceto* (4) this House reversed the decision of the Court of Appeal upon a question of fact.

The House took time for consideration.

1893. Feb. 27. Lord Herschell L.C.:—

My Lords, this action was brought in respect of a collision which happened in the straits of Dover between the steamships *P. Caland* and *Glamorgan*, by which the latter vessel was lost.

The most important question raised depends upon the construction of the 5th article of the sailing regulations. At the time of the collision the *P. Caland* had at her mast-head, in place of the regulation white light, three red lights, indicating that she was not under command. The question is, whether she was, under the circumstances, justified in exhibiting these lights. At the time when she thus exhibited them she was proceeding at a speed which must be taken to have been not less than four to five knots. Both the Courts below have held that she cannot properly be said to have been not under command at the time in question.

(1) 2 Asp. M. L. C. (N.S.) 454.

(2) 10 P. D. 65.

(3) 9 P. D. 164.

(4) 14 App. Cas. 670.

Construing the article as a whole, it is certain that a vessel may not be under command within the meaning of those words as used in the article, and yet be making way through the water; for it is provided that, if making way through the water, a vessel shall carry the ordinary side-lights as well as the three red lights at her masthead.

At the same time, I desire to say that I do not think that because the rule contemplates that a vessel not under command may be justified in making way through the water, it therefore implies that a vessel in so disabled a condition is always justified in continuing so to make way. This must depend upon the circumstances, and in my opinion a vessel which cannot shew that they were such as to justify her in taking this course, must be held to blame for not acting in a reasonable and seamanlike manner, even though she had complied with the statutory regulation. It never was intended that under all circumstances a vessel should be entitled to proceed at a considerable speed through the water, throwing upon other vessels, out of whose way she would ordinarily have had to get, the obligation to get out of her way, though the circumstances might no doubt be such as to justify that course. For example, it might be necessary in order to avoid some danger which would otherwise be imminent. Or, again, if she were very near port, it might be reasonable and prudent to pursue her course.

With these preliminary observations I proceed to consider the construction of the article.

In the Court of Appeal the Master of the Rolls expressed himself as follows: "Now looking at the words of the statute, at the first part of the clause, which speaks of her not being under command, and the second part, her not being under command so that she cannot keep out of the way—taking those two together, it seems to me that the real construction of the rules is, that she must, through some accident, be in such a position that she is not under command in this sense, that she could not keep out of the way of another vessel coming near her. But if she can be steered, and can be stopped, and can go ahead—which is necessary in order that she may be steered—then she is under command, and the apprehension of her being likely (however well founded) to be in a few moments out of command does not shew that she is out of command at the moment spoken of." And the other learned judges concurred in this view.

I cannot but think that this construction is somewhat too narrow. Suppose the vessel, though having steerage way on her and capable of being steered to port or starboard, yet, owing to some disablement, answered her helm but very slowly, so that if an occasion for doing so should arise she could not get out of the way of another vessel in the manner which such vessel would have reason to anticipate. And suppose, though she can stop and reverse, she can only do so after great and unusual delay. I am not satisfied that in either of these cases she might not be probably described as not under command, and not able to keep out of the way of other vessels. It is not necessary to dwell upon the point as it has no application to the present case, but I wish to guard against being supposed to assent to so narrow a construction as appears to me to have been adopted by the Court below.

Again, suppose that, owing to a breakdown of the machinery, its ceasing to be capable of propelling the vessel is reasonably regarded as imminent and likely to occur at any moment, I am not satisfied that in this case a vessel may not properly be said, within the meaning of the rule, not to be under command. If she were to allow other vessels to continue their course and to manœuvre on the assumption that she would get out of their way, she might prove unable to take any action at the very time when a change of direction on her part could alone enable her to keep out of the way and thus avert disaster. It would certainly tend to safety if under such circumstances the rule required her to warn other vessels to keep out of her way, and I do not think any violence need be done to the language used to construe it as extending to such a case.

Even assuming, however, that the article will bear this construction, I am of opinion that the *P. Caland* cannot be said to have been out of command at the time of the collision. She was able to proceed at a rate which I think cannot have been less than four to five knots an hour. This speed was maintained, after the damage to the machinery presented itself and the three red lights were exhibited, for half to three-quarters of an hour before the collision. The two vessels were a considerable time locked together, and after they were separated the *P. Caland* steamed for half an hour before she became stationary. Even then it would appear that the machinery did not come to a standstill on account of its damaged condition, but was intentionally stopped for the purpose of repairing the damage.

Under these circumstances, I cannot hold that, owing to the disablement of the machinery, the risk of its ceasing to work was so imminent that the vessel can be said not to have been under command within the meaning of the rule. I think, therefore, that she was not justified in exhibiting the three red lights at her masthead, and must be held to have infringed the sailing regulations. And it appears to me impossible to say that this breach of the regulations was in no way connected with the collision which occurred, and cannot be said to have at all contributed to it. In my opinion, therefore, it has been rightly held that the *P. Caland* was to blame.

The question whether the *Glamorgan* was also to blame is to my mind one of much greater difficulty, and depends upon whether she saw, or ought to have seen, the *P. Caland's* side-lights. If she did or could have seen the red side-light of that vessel, it is not disputed that she must be held to blame. The question is, Did she or could she have seen that side-light? The evidence of those on board the *Glamorgan* is distinct that this light was not visible, whilst the evidence of those on board the *P. Caland* that the light was exhibited is equally unequivocal. So far as regards their demeanour, the learned judge before whom the action was tried saw no reason to give credence to one set of witnesses rather than to the other.

[His Lordship then discussed the evidence bearing upon this question of fact, and concluded as follows:—]

Weighing all the probabilities, I confess I should myself be disposed to come to the conclusion that the red side-light was visible, and that those on board the *Glamorgan*, having observed the three masthead red lights, and being aware that they were approaching a disabled vessel, took it for granted that she was at a standstill, and their observation being directed, under this

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impression, to the masthead lights, they failed to observe the red side-light, and accordingly bore down upon the *P. Caland*, under the impression that she was stationary. But both the Courts below have, on the balance of probability, thought it more probable that the red side-light was not visible than that, being visible, it was either unseen or disregarded by the *Glamorgan*.

Now, I quite agree with what has been said in this House in previous cases as to the importance of not disturbing a mere finding of fact in which both the Courts below have concurred. I think such a step ought only to be taken when it can be clearly demonstrated that the finding was erroneous. In the present case, although I might probably myself have come to a different conclusion, I cannot say that any cardinal fact was disregarded or unduly estimated by the Courts below. I can lay hold of nothing as turning the balance decisively the one way rather than the other. I think the decision of the question of fact at issue depends upon which way the balance of probability inclines, and I am not prepared to advise your Lordships that it so unequivocally inclines in the opposite direction to that indicated in the judgments of the Courts below, that this House would be justified in reversing the judgment appealed from.

LORD WATSON:—

My Lords, whether the *P. Caland* did or did not, from the time when she came in sight of the *Glamorgan* until the vessels collided, shew her side-lights, as well as the three red lights specified in art. 5 of the regulations, which she admittedly carried, appears to me to be the cardinal question in this appeal.

If the *P. Caland* did not, during that period of time, exhibit side-lights, then she was clearly to blame; because, whilst she was making about four knots an hour through the water, her three red lights conveyed a distinct intimation to approaching vessels that she was stationary. And, upon that hypothesis, I can find no ground for imputing either breach of the regulations or negligent seamanship to the *Glamorgan*.

On the assumption that the *P. Caland's* side-lights were visible, I think it would be impossible to acquit the *Glamorgan* of fault. In that case, the evidence does not disclose any circumstance which could justify her in steering her course across the bows of the *P. Caland*. It would, however, be necessary to consider whether the latter vessel was in a condition which warranted her being navigated under signals appropriate to a steamship not under command, and yet making way through the water; and, if not, whether her use of regulation signals, which she was not entitled to assume, was in any degree contributory to the collision. There might possibly be circumstances in which such a misuse of signals might tend to mislead another vessel, and so aid in producing a collision between them. But my present impression is that the natural effect of a steamship under command masquerading as a ship not under command, would be to induce other vessels to give her a wider berth than they would have allowed if she had carried her ordinary foremast light.

These questions do not arise for decision in the view which I take upon the main question of fact. But I take this opportunity of stating my entire concurrence in the observations which have been made by the Lord Chancellor as to the construction of the 5th article of the regulations.

Whether the *P. Caland* did or did not properly exhibit her side-lights is a pure question of fact, mainly depending for its solution upon probabilities which are more or less matter of speculation. Jeune J., in the Admiralty Division came to the conclusion that her side-lights were not shewn, and his view of the fact was accepted by all the judges of the Court of Appeal.

In my opinion, it is a salutary principle that judges sitting in a Court of last resort ought not to disturb concurrent findings of fact by the Courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous. And the principle appears to me to be specially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability. I may add that the principle was recognised as governing the decisions of this House in the Scotch appeal of *Gray* v. *Turnbull* (1). That case

(1) Law Rep. 2 H. L., Sc. 53.

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commenced, not in the Sheriff Court, but in the Court of Session; so that their Lordships were not debarred by any statute from reviewing findings of fact as well as of law.

If the question had come before me as judge of first instance, I am not prepared to affirm that I would have answered it in the same way as the learned judges of the Admiralty Division and the Court of Appeal. But this I can say, that having done my best to weigh the probabilities of the case, I am unable to resist the impression that, whatever may be my own leaning, their decision is as likely to be right as a finding the other way.

In these circumstances I cannot disregard the rule of the House, and I therefore assent to the judgment proposed by the Lord Chancellor.

LORD ASHBOURNE :—

My Lords, I concur. I am myself strongly disposed to think that the red side-light was visible. But it is a question of inference and balance of probabilities, and I quite fail to find any clear fact on which I would be justified in arriving at a conclusion different from that of the Courts below. It is manifest that your Lordships would be most reluctant to differ from such a conclusion without clear and strong reasons.

LORD MORRIS :—

My Lords, I concur.

Judgment of the Court of Appeal and Decree of the Admiralty Division affirmed and appeal dismissed with costs.

Lords' Journals 27th February 1893.

Solicitors for appellants: *Pritchard & Sons.*
Solicitors for respondents: *Thomas Cooper & Co.*

[HOUSE OF LORDS.]

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WILLIAM HART SAVERY AND THOMAS WAGHORNE STEVENS . . . . . APPELLANTS;

AND

THE ENFIELD LOCAL BOARD . . . RESPONDENTS.

Solicitor and Client—Costs—Taxation—Costs of Preparation of Lease and Agreement for Lease—"Business connected with Lease"—Solicitors' Remuneration Act 1881 (44 *&* 45 *Vict. c.* 44) *ss.* 2, 4—*General Order under Solicitors' Remuneration Act* 1881 *r.* 2; *Sched. I. Part II.*

The scale fee prescribed by Part II. of Sched. I. to the General Order made under the Solicitors' Remuneration Act 1881 to be paid to a lessor's solicitor "for preparing, settling and completing lease and counterpart,'' includes the solicitor's remuneration in respect of negotiations which lead up to, and the preparation of the agreement which precedes, the lease, and the solicitor cannot charge in respect of those negotiations or of the preparation for the agreement in addition to the scale fee.

In re Emanuel and Simmonds (33 Ch. D. 40) approved.

APPEAL from an order of the Court of Appeal.

Trustees in whom land was vested agreed with the respondents to grant them a lease of the land for a reservoir. The appellants were employed by the trustees as their solicitors to advise them in respect of the negotiations, as to their power to grant a lease, and in the preparation of an agreement for a lease and of the lease which was eventually executed. The appellants delivered a bill of costs against the respondents charging the scale fee authorized by Sched. I. Part II. of the General Order under the Solicitors' Remuneration Act 1881 for the preparing, settling and completing the lease and counterpart, and in addition the appellants' costs relating to the negotiations for and the preparation and execution of the agreement for the lease. The Taxing Master having on the authority of *In re Emanuel and Simmonds* (1) disallowed the additional costs a summons to review was taken out by the appellants which was dismissed by North J., and that decision was affirmed by Lindley and Fry L.JJ.

(1) 33 Ch. D. 40.

The material parts of the Solicitors' Remuneration Act 1881 and the General Order made under it are given in the judgments.

Sir *H. Davey* Q.C. and *W. Wills* for the appellants :—

There is no appeal from the discretion of a Taxing Master, but where, as in the present case, a question of principle is involved an appeal lies. The rules under the Solicitors' Remuneration Act place the solicitor much more under the dominion of the Taxing Master than he formerly was, and these rules ought therefore to be very strictly construed. The Courts below considered that they were bound by *In re Field* (1) and *In re Emanuel and Simmonds* (2). But the decision of this House in *Parker* v. *Blenkhorn*, *Newbould* v. *Bailward* (3), is more in point and shews that a solicitor is not deprived of remuneration for work outside the items covered by the General Order rule 2 and sub-sects. *a*, *b*. The present case is within *c* which deals with "business not hereinbefore provided for," and was intended to supplement *a* and *b*. The words which define the cases covered by the scale fee cannot be stretched to cover other cases. There was in this case much business, including the preparation of a document outside the lease and counterpart, for which the solicitor was entitled to charge in the ordinary way, and for which he could not charge according to the scale: *In re Pybus* (4).

Philbrick Q.C. and *Swinfen Eady* for the respondents were not heard.

LORD HERSCHELL L.C. :—

My Lords, this is an appeal from a judgment of the Court of Appeal, intended to invite your Lordships to overrule the decisions which were arrived at by that Court in the cases of *In re Field* (1) and *In re Emanuel and Simmonds* (2). The question arises upon the taxation of a bill of costs of the solicitors who were engaged in relation to a lease which was granted by Messrs. Nott & Purdey to the respondents, the

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(1) 29 Ch. D. 608.
(2) 33 Ch. D. 40.
(3) 14 App. Cas. 1.
(4) 35 Ch. D. 568, 571.

Enfield Local Board. Messrs. Nott & Purdey were trustees under a will, and the Enfield Local Board desired to take a part of the land which was vested in them as trustees for the purpose of constructing a reservoir upon it. A question arose as to the power of the trustees to lease their lands for the purpose of the construction of a reservoir, their powers being to grant long leases only for building purposes; and this question it was found must be determined before it would be safe for the respondents to take, or for the trustees to grant, a lease. Accordingly an agreement was arrived at between the trustees and the respondents in which certain terms were set out as the terms of the proposed lease, and the whole transaction, of which the agreement was evidence, was to be completed by a lease only if the Court determined that this was within the power of the trustees. Accordingly application was made to Chitty J. and he sanctioned the lease with the addition of a provision for the restoration of the land at the end of the term to its original condition.

No question arises with regard to the costs of the proceedings in Court which were necessitated by the state of the title, and the doubt which arose as to the power to grant the lease, because it was admitted that the solicitors employed were entitled to those costs. Nor is there any question of course as to the actual preparation of the lease itself and the procuring its due execution by the parties.

The only question which arises is with regard to a claim by the solicitors to charge, in addition to the scale fee fixed by the orders made under the Solicitors' Remuneration Act, in respect of the negotiations which led up to and the preparation of the agreement which preceded the lease. The Court of Appeal have held that those negotiations and the preparation of that agreement are included in the scale fee provided for by the order; and of course if they are so included the solicitor, who has taken advantage of and claimed under the scale fee provided by the order in respect of the preparation of the lease, must be bound to limit himself to all that on the true construction of the order is covered by that fee.

The question therefore turns upon the construction of the order with its schedules and the rules relating to them. But it must be borne in mind that the object of the Act was to enable a general order to be made "prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action or transacted in any Court or in the chambers of any judge or master."

Under that statute a general order was made. The second clause of that order provided that "the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing," "is to be regulated as follows: (*a.*) In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business" "is to be that prescribed in Part I. of Sched. I. to this order." "(*b.*) In respect of leases and agreements for leases of the kinds mentioned in Part II. of Sched. I. to this order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part II. of such Sched. I." Then (*c.*) provides that for "business not hereinbefore provided for, connected with any transaction the remuneration for which if completed is hereinbefore, or in Sched. I. hereto, prescribed, but which is not in fact completed, and in respect of settlements, mining leases or licences, or agreements therefor, re-conveyances, transfers of mortgage, or further charges," and generally for "all other business the remuneration for which is not hereinbefore, or in Sched. I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Sched. II."

Now, turning to Sched. I., Part II., which relates to leases, the provision of the Second Scale is as follows: "Scale of charges as to conveyances in fee, or for any other freehold estate reserving rent, or building leases reserving rent"—then, omitting a few words, there follows this: "Vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart:—Where the amount of annual rent does

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not exceed £5, amount of remuneration £5"; and then there is a progressive scale, being a percentage upon the amount of the rent.

The contention on the part of the appellants is that, reading together sect. (*b.*) of clause 2 of the order and the Second Scale of Sched. I., Part II., all that is provided for in respect of leases is the remuneration to be paid "for preparing, settling, and completing the conveyance and duplicate," or, dealing with leases alone, "for preparing, settling, and completing the lease and counterpart," and that anything which is done beyond work coming within the strict and literal interpretation of those words is to be paid for separately—is unprovided for by these rules, and is to be paid for as if no such order were made. The words which I have read apply to the vendor's or lessor's solicitor. As to the purchaser's or lessee's solicitor, he is to have "one half of the amount payable to the vendor's or lessor's solicitor" "for perusing draft and completing"; and it is contended that for everything which does not come within the terms "perusing draft and completing" the matter is left at large and the purchaser's solicitor is left entirely at liberty to make any charge outside this order or outside any scale provided for by it.

Now, my Lords, I do not think that that is the true construction of the order and schedule. In the former paragraph, that which relates to "sales, purchases, and mortgages," it is quite clear that the words "sales, purchases, and mortgages" are not confined to the actual instrument by which the sale or the purchase or the mortgage is completed, but that those words include the "business connected with the sale, purchase, or mortgage" —all that leads up to the final completion of the transaction; because, when you turn to the scale of charges in Sched. I., Part I., you find a provision there which renders it impossible to doubt that the words "sales, purchases, and mortgages" are used in that sense in that clause. Then clause (*b.*) relates to leases and agreements for leases; it provides for the remuneration of the solicitor in respect of leases and agreements for leases. There it is said that, looking to the 2nd schedule, all that is intended to be referred to is the actual instrument, the lease; and that nothing which has gone before is to be included. My

Lords, I do not think that that is a reasonable interpretation of this order. It appears to me that the remuneration intended to be settled was the remuneration for all the transaction ordinarily covered by the execution of a lease resulting from the negotiations leading up to that execution, and not merely for the preparation and settling, in the very limited sense which has been given to it, of that particular instrument.

I think that there are two provisions to be found in relation to this Sched. I., Part II., which strongly point in that direction. There are certain rules applicable to Part II., Sched. I. The first of those rules is, "Where the vendor or lessor furnishes an abstract of title, it is to be charged for according to the present system as altered by Schedule II." Now, according to the contention of the appellants, that is wholly irrelevant to the provision of Sched. I., Part II.; because, according to that contention, Sched. I., Part II., has no relation to anything except the "preparing, settling, and completing," or the "perusing draft and completing" of the lease and counterpart; and yet one finds that express provision as to a charge to be made in that case, which would tend either to point to the conclusion that a charge was to be made in no other case, or to point to the conclusion that the schedule ought not to receive the very limited construction which is sought to be put upon it on the part of the appellants. I think the latter is the more legitimate use of this 1st rule; but in either case, whether that be so or not, it would tend to shew that the charge for which the appellants now contend cannot be made.

Then, my Lords, the 5th rule also appears to me to point in the same direction: "Where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." Now, it is not disputed that in so far as the lease is in consideration of a lump sum down, the remuneration relating to that part of the transaction will cover the whole of the negotiation to its close, because the scale in Sched. I. is there brought in; and yet the provision is that that sum shall

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be paid, not in addition to any other payment to which the solicitor is entitled, but "in addition to the remuneration hereby prescribed in respect of the rent," which tends to shew that, as regards the part other than that covered by the payment of that lump sum, all the remuneration to which the solicitor would be entitled would be that which is hereby prescribed in respect of the rent. Of course I do not say that that is conclusive, but it certainly throws light upon the construction of the 2nd schedule, and points in the direction of the conclusion arrived at by the Court below. It appears to me that the object of this scale really was to cover the whole of the transaction from the beginning to the end—that is to say, all that is ordinarily involved in the carrying out of a letting by a lessor to a lessee.

My Lords, of course, I entirely concur in what has been said, that it would not cover any collateral matter which was not one ordinarily within what I have called the whole transaction of the letting from its inception to its conclusion. It cannot be said that these rules or the terms of the schedule are as happily expressed as one can conceive possible. They are so drawn as no doubt to give rise to a good deal of argument, and to create a certain amount of difficulty in their construction. But looking at the object and purpose of the statute, I cannot think that it was intended by this order, framed under it, to leave in almost every transaction, even in cases in which this system of payment by scale was adopted, a considerable portion of the transaction uncovered by the scale, and to be dealt with in the ordinary way by an account. It seems to me that that would really go far to defeat the very object which was in view in fixing and adopting this mode of remuneration.

It was sought to be argued that the contention of the appellants would not lead to that conclusion, inasmuch as it might be limited to cases where an agreement was necessary. My Lords, in point of law I do not know that it can be said that an agreement was necessary here, any more than it might be said to be necessary in every case, inasmuch as it might be expedient, before you proceeded to occupy yourself about the settlement of the terms of a lease and the drawing of it, to see at all events that the parties were at one, to have an agreement on those particular terms. In that sense it may be said to be always, or at any rate to be often, an expedient thing to do, and in no other sense, as it appears to me, can it be said here to be necessary. Therefore, to accede to the contention of the appellants would really leave it open to a solicitor, in addition to the scale fee, to make a further charge, in the ordinary fashion which was in existence before this scale fee was arrived at, for a considerable number of things which are said to be outside it. It would leave it in every case open to dispute and discussion how much there was outside of it, and it would necessitate in all those cases a taxation. That is the very thing which it was sought to avoid by this legislation.

For these reasons, my Lords, I move your Lordships that the judgment appealed from be affirmed.

LORD HALSBURY:—

My Lords, I am entirely of the same opinion. It seems to me to be impossible to read the Solicitors' Remuneration Act of 1881 without seeing that the authors of that Act had considered that the mode of charging for conveyancing and other non-contentious business was not satisfactory, and that they intended to provide, partly for the sake of solicitors and partly for the sake of the public who required their assistance, that there should be some guidance with respect to the mode in which charges should be made, and that those charges should not be dependent either upon the length of the documents which were being prepared or upon the number of documents which were being prepared in each particular case. The object of the statute which authorized a general order which should prescribe in particular classes of cases a gross sum or a fixed sum for each document prepared or perused, without regard to length, to my mind points irresistibly to this, that whereas a great deal had been necessarily left to the taxing master, and no client could be quite certain beforehand what would be the rate at which he would be charged, a general order might prescribe for certain well-known classes of business, including things that were incidental to the transaction of them, so that the client might be able to say: "Looking to such and such a document, looking at the amount of rent and the fact that this is a lease, I can pretty well find out what I shall have to pay if I employ a solicitor for this purpose." Accordingly a general order was passed in this form.

Now, I cannot doubt that the persons who, in framing that order, were intending to put the Act of Parliament into operation, the learned and distinguished officers who were entrusted with that duty, had in their minds the object and meaning of the statute under which they were purporting to act; and certainly (I am applying myself still to the particular document with which we are here dealing) if one could imagine a condition of things in which a person who had called in a solicitor to advise him in getting a lease could be charged first for the preliminary document by which the parties were brought into communication with each other, then for a document which should be prepared, and might be prudently prepared with reference to binding the parties, whether to the granting of a lease or not, and then charged for something else which might be incidental to the same thing, it appears to me that the passing of the Act of Parliament and the framing of this General Order under that Act would be the idlest possible farce. In every case in which a lease was to be prepared, instead of there being simply a gross sum, according to the scale which was intended I should think to prevent litigation between the solicitor and the client, and to give the latter beforehand a fair notion of what the expense would be, the discussion between them might be protracted indefinitely as to what was and what was not included in the transaction of the business (to use a non-technical phrase) between them.

There was no doubt, or at all events there was considered to be, a tendency among lawyers generally to increase the number of documents and the length of the documents with a view to the remuneration which they would receive afterwards, it being quite unnecessary to use ten or a dozen words where two would suffice; and this Act of Parliament and the General Order made under it were intended to correct, as far as it was possible to correct it beforehand, that tendency. It is manifest that that is the meaning of the statute; because if one looks at the 4th section one finds the general considerations by which the General Order was to be guided. The 4th section is this: "Any general order under this Act may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode and partly in another or others, and may as regards the amount of the remuneration regulate the same with reference to all or any of the following among other considerations (namely)":—the last but one, which is the only one of the "considerations" which I think it is material for my present purpose to read, is "The number and importance of the documents prepared or perused, without regard to length." The policy of the Act is manifest to my mind from what I have referred to. Now it is clear that if this judgment were to be reversed there would have to be an inquiry in each particular case as to whether or not something or other which had been done in the progress of the business leading up to the lease was in one sense collateral to the actual framing of the document. The learned counsel for the appellants have more than once I think attempted a definition of what is or is not to be included in the words which we have to consider in the General Order "preparing, settling, and completing." They seem to me to have been in this difficulty, that if they applied the rigour of definition to each of those words, in the strict use of the language no preliminary negotiation, no preliminary conversation between the respective clients, could possibly be included in the charge. They would be compelled to say that such and such a thing was not "preparing" the lease, that it was not "settling" the lease, that it was not "completing" the lease, and it would be perfectly true. If, on the other hand, they are compelled as a matter of business to admit that those words must be construed in a somewhat wider sense than the mere technical use of the words themselves, it is manifest that those who were dealing with this matter and well understood what they were referring to would, as a matter of business and as everybody would understand, when talking about settling a lease, include the negotiation between the parties as to what the terms were to be. Now if that is the sense in which the words are to be construed, it is quite clear that the solicitor who has in this sense obtained, and by his own assent obtained, the scale charge cannot have another charge outside the scale for what is, within the meaning which I have attached to these words, already included in the scale payment.

For these reasons, my Lords, it appears to me to be manifest that the judgment of the Court of Appeal was right, and that this appeal ought to be dismissed.

LORD MACNAGHTEN :—

My Lords, I concur.

LORD SHAND :—

My Lords, the question which has been discussed in this case formed the subject of a decision so long ago as 1885, and has been repeatedly before the Courts since that time with the result that every judge without exception has held that the view which has been the subject of complaint in this appeal was sound. In these circumstances and looking at the practice which has followed, I think the appellants, in order to succeed in the appeal, must make it very clear that their construction of this statute and table is the correct one. But I concur with your Lordships in thinking that the statute has been rightly construed by the Court of Appeal.

The argument has been rested entirely upon the expression contained in Part II. of Sched. I. in these words: "Vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart." It has been maintained that those words are to be taken in the narrowest or strictest sense with the result of allowing separate charges for attendances and negotiations prior to the lease of such a nature as those which in this case occurred. But, my Lords, it appears to me, as it does to your Lordships, that those words cannot be taken in the narrow and limited sense which has been suggested. A purpose, and as I think a leading purpose, for which the Solicitors' Remuneration Act of 1881 was passed was to avoid having a great many detailed entries or charges which had been usual in solicitor's accounts, and to supersede those detailed charges by a slump charge which would cover many matters of detail. That purpose is made very clear by clause 4 of the statute, which prescribes that "any general order under this Act may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length." It was under that Act that this order was made; and it appears to me that in this particular matter the very purpose of the order has been to supersede charges for preliminary business, and detailed entries, by giving a general scale of charge.

My Lords, I do not think that it would be reasonable to take the words occurring in Part II. of Sched. I. by themselves. You must look at the parts of the order to which that schedule refers in construing it. I find in the first place that sect. 2 of that general order is put in this way: "The remuneration of a solicitor in respect of business *connected with* sales, purchases, leases, mortgages, settlements and other matters of conveyancing" "is to be regulated as follows." The terms are very general—"business connected with sales, purchases, leases," and again in sect. (*b.*) which deals with leases there are these words: "in respect of leases and agreements for leases of the kinds mentioned in Part II. of Sched. I.," "when the transactions shall have been completed the remuneration of the solicitor *having the conduct of the business* is to be that prescribed in Part II. of such Sched. I." In those two passages you have general terms used, "business connected with leases," and "the conduct of the business." And when I turn to the schedule itself I think these expressions shew that the words "preparing, settling, and completing the lease" cannot be taken as simply referring to the mere drawing of the document and getting it copied out and signed. Indeed I rather understood the appellants' counsel to concede that if negotiations occurred, if meetings took place or difficulties arose after the instructions for the preparation of the lease were given, it would not be within this rule that in addition to the charge for the lease there should be a charge for the trouble connected with those negotiations. It seemed to be conceded that if a client came to a solicitor and instructed him to get a lease prepared and difficulties were found to exist and meetings were caused either with the lessee's solicitor or with the client, those must be held to be fairly covered by the term "settling the lease." If that be so I think it destroys the basis of the argument for the appellants. The moment it is admitted that those words go beyond the mere preparation of the document, I think it follows that what is preliminary to the preparation of the document is not to be made a subject of charge. In many cases there must no doubt be much more trouble in preparing the lease and negotiating than in others,—either meetings of the solicitors with the client or with the lessee's solicitor. There may on the one hand be cases of considerable difficulty; but on the other hand there are many cases which are extremely easy—indeed the great bulk of cases are of that nature. Now, my Lords, taking that view, that these words are not to be accepted in a narrow sense, it appears to me that a preliminary agreement for a lease such as we have here is completely covered by the words which are used.

I concur with what has fallen from my noble and learned friend (Lord Halsbury) that if there were to be a reversal of the judgment in this case, the law on this subject would be thrown into confusion. In the first place, it seemed to be conceded that a charge would only be allowed when an agreement was necessary. Then it would be a question for the Taxing Master to say whether it was necessary or not. In the next place supposing it turns out that the lease is simply a copy, almost a verbatim copy, of the clauses contained in the agreement, would it be reasonable that each of these should be charged for as for a separate deed, a new deed? I understood that the learned counsel for the appellants could not maintain that proposition. He said again that it would be for the Taxing Master to say whether in those circumstances the charge should be smaller or greater and that it would become a question of quantum meruit. Now the very circumstance that questions of that kind would occur if the law were thrown open on this subject is a reason for adhering to the

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table; and it appears to me that the table being expressed in terms which would fairly cover, as I think, a preliminary negotiation, it should be held as including the matter in question in this case. The question really comes back to what was said by the learned judge who had first to consider the point, Chitty J., in the case of *In re Field* (1). He said, "Solicitors take these matters for better for worse. There is, as I have often heard the late Master of the Rolls observe, a kind of give and take in these matters. They get more in one case and less in another, and for this reason very likely in settling this scale some sort of rough and ready rule for regulating the remuneration was laid down." I entirely concur in that view and in the views which your Lordships have expressed in this House.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 27th April 1893.

Solicitors for appellants: *Savery & Stevens.*
Solicitors for respondents: *Dixon, Weld, & Dixons.*

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(1) 29 Ch. D. 608.

[HOUSE OF LORDS.]

H. L. (E.) WILLIAM STEERS (PAUPER) . . . . . . APPELLANT;

1893

AND

April 28. HENRY JOHN ROGERS . . . . RESPONDENT.

Patent—Co-owners by Purchase—One Co-owner Mortgagee of other Co-owner's Share—Patent worked by Mortgagee Co-owner—Profits received as Mortgagee.

Where a patentee assigns to each of two persons a moiety of his patent rights each assignee can work the patent without being liable to account to the other for profits: And none the less if one of the assignees be mortgagee of the other's moiety.

So *held*, affirming the decision of the Court of Appeal ([1892] 2 Ch. 13).

The decision in *Mathers* v. *Green* (Law Rep. 1 Ch. 29) approved.

APPEAL from an order of the Court of Appeal. The facts are set out in the report of the case below (1): and for the present purpose it is enough to say that the appellant was, under an assignment from the patentee, assignee of one moiety of letters patent for improvements in the manufacture of gas. The respondent was assignee of the other moiety of the letters patent, and mortgagee of the appellant's moiety. The appellant having brought an action against the respondent for the purpose mentioned by Lord Herschell L.C., an application was made on the plaintiff's behalf that the defendant might be ordered to give an account of all profits received by him as mortgagee in respect of the letters patent. The application was dismissed by Romer J. and that decision was affirmed by the Court of Appeal (Lindley and Kay L.JJ.) (1).

Oswald and *Deans* (*Ritter* with them) for the appellant:—

A mortgagee in possession is in a quasi-fiduciary position, and not the less so because he happens to be a part-owner as well as mortgagee. The Courts below considered themselves to be bound by *Mathers* v. *Green* (2). But that case was wrongly decided, and is distinguishable. In this case the doctrine of *Mathers* v.

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(1) [1892] 2 Ch. 13.

(2) Law Rep. 1 Ch. 29.

Green (1) has been extended. Can the owner of a hundredth part of a patent work the patent, and appropriate all the profits, leaving the other ninety-nine in the wilderness? In deciding that a joint owner of a patent may work it without accounting to the other joint owner, Lord Cranworth L.C. grafted an exception on the general law in favour of patentees. Wood V.C. in *Hancock* v. *Bewley* (2) decided in a sense opposite to *Mathers* v. *Green* (1). The law as to the rights and liabilities of co-owners is laid down in *Strelly* v. *Winson* (3), where a joint owner who refused to navigate a ship was held liable to bear his share of the loss, because he would have been entitled to share profits, if there had been any profit.

[LORD HERSCHELL L.C.:—In *Horn* v. *Gilpin* (4) it was held that the whole loss of a ship fell upon the partner who freighted against the express wish of the other.]

In *Green* v. *Briggs* (5) the general law of partnership was held to be applicable to the part owner of a ship. Lindley L.J. in his Partnership, 5th ed. p. 62, says that "as a general rule where one owner of a chattel derives gain from its use, he is, independently of any contract, bound to account to the other owners." See also Hindmarch on Patents, p. 67. Even if *Mathers* v. *Green* (1) be good law, it cannot be extended to assignees indefinitely.

Bartley Denniss, for the respondent, was not heard.

LORD HERSCHELL L.C.:—

My Lords, at the outset of the hearing of this appeal objection was taken to the appeal being heard, on the ground that there was no jurisdiction, inasmuch as this was an appeal from an interlocutory order made in an action, that the action had itself been dismissed, and that there was no appeal depending in your Lordships' House or elsewhere against that dismissal. It is not necessary to express any opinion, and I must not be taken as expressing any opinion, as to whether that point was a good or a

(1) Law Rep. 1 Ch. 29.
(2) Joh. 601.
(3) 1 Vern. 297.
(4) Amb. 295.
(5) 6 Hare, 395.

bad one, and whether or not, therefore, in fact there is jurisdiction to entertain this appeal, inasmuch as, I believe, all your Lordships are of opinion that on the merits there is no ground for this appeal, and that the appeal must be dismissed. The question of jurisdiction therefore becomes immaterial.

My Lords, the appeal is from an order made upon an application to compel the defendant to give an account of moneys which he had received as mortgagee of a share of a patent; and the question raised is whether the defendant, who is the respondent here, was under any obligation to account for any share of profits which he had admittedly made by the manufacture of certain articles according to the provisions of the letters patent. It appears that the action was brought for a declaration that an assignment, which purported to be absolute, of a moiety of the patent, was not an absolute assignment, but that the defendant must be treated, as to that moiety, as mortgagee. The Court gave effect to that contention of the appellant, the plaintiff in the action. Indeed it was admitted by the learned counsel for the defendant that it was impossible to resist the conclusion that he must be regarded as mortgagee only, and not absolute owner of that moiety. It is, however, equally certain that the defendant was the absolute owner of the other moiety of the patent right. The profits which it is said he is bound to account for were profits made by him in his business by vending articles in the manufacture of which the invention was used.

I will for a moment deal with the case as though the defendant had not been mortgagee at all, but had been only the owner of one half of the patent right, the ownership of the other half being vested absolutely in the plaintiff, the appellant. The appellant must establish that, where letters patent are thus vested in two assignees, if either of them makes use of the invention in his business, he is bound to account to the other for a share of the profits derived from the articles manufactured according to the invention. In the case of *Mathers* v. *Green* (1), which came before Lord Cranworth as Lord Chancellor, it was held that, "where a patent for an invention is granted to two or more persons in the usual form, each one may use the invention without the consent of the others," and if he so uses it, is not bound to account to the others for any share of the profits which he makes by its use. Lord Cranworth says: "There is no principle, in the absence of contract, which can prevent any persons, not prohibited by statute, from using any invention whatever. Is there, then, any implied contract where two or more persons jointly obtain letters patent, that no one of them shall use the invention without the consent of the others, or, if he does, that he shall use it for their joint benefit? I can discover no principle for such a doctrine. It would enable one of two patentees either to prevent the use of the invention altogether, or else to compel the other patentee to risk his skill and capital in the use of the invention on the terms of being accountable for half the profit, if profit should be made, without being able to call on his co-patentee for contribution if there should be loss."

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(1) Law Rep. 1 Ch. 29.

The learned counsel for the appellant maintained, as he was entitled to do in your Lordships' House, that that decision was not good law; but it appears to me to be both good law and good sense when the nature of patent rights is regarded. What is the right which a patentee has or patentees have? It has been spoken of as though a patent right were a chattel, or analogous to a chattel. The truth is that letters patent do not give the patentee any right to use the invention—they do not confer upon him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all; only in that case all the world would equally have the right. What the letters patent confer is the right to exclude others from manufacturing in a particular way, and using a particular invention. When that is borne in mind, it appears to me very clear that it would be impossible to hold, under these circumstances, that where there are several patentees, either of them, if he uses the patent, can be called upon by the others to pay to them a portion of the profits which he makes by that manufacture, because they are all of them entitled, or perhaps any of them is entitled, to prevent the rest of the world from using it.

The learned counsel then seeks to distinguish that case from the present (and no doubt it is so far distinguishable in point of fact) on the ground that here the plaintiff and the defendant were not the original patentees, but that they had each obtained their interest of a moiety of the patent right under assignments from the original patentee. We have not before us the terms of those assignments, and therefore for the present purpose it must be assumed that they were as full and ample as such assignments could be; and what the learned counsel must establish in order to maintain his proposition is this, that where a patentee assigns to each of two persons a moiety of his patent right, neither of those persons obtains by such assignment the right to work according to the patent without the obligation to account to the person who is the other assignee for a moiety or a share of the profits which he makes by the manufacture. No authority has been given for the proposition that any such obligation comes into existence, and I think that the reason which supports the case of *Mathers* v. *Green* (1) is sufficient to establish that it is a proposition which cannot be maintained.

That is all that is before your Lordships at the present time. You have not to determine the rights of assignees of a patent *inter se,* or to what extent an assignment may go, or what would be the several rights of one against the other, beyond this, that the proposition is not made out that the mere fact that it is shewn that two persons have each obtained an assignment of a share of a patent from the patentee confers upon each of them, if the other in the course of his business uses the patented invention, a right to an account from that other of the profits made and to the receipt of a share of those profits.

So far I have dealt with the case as though the plaintiff had been the absolute owner of one moiety and the defendant of the other; but it appears that the plaintiff had mortgaged his interest in the patent to the defendant, so that he was as regards that interest of a moiety a mortgagee. It is suggested that because he was a mortgagee an obligation to account to the mortgagor arises, which would not have arisen, according to the decision at which your Lordships have arrived, in case the other person had not been the mortgagor, but had been a person

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(1) Law Rep. 1 Ch. 29.

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absolutely interested in the moiety. My Lords, it is really a point so fine that it does not seem to me substantial, and I am unable to grasp it or to see why, if the defendant as owner of a moiety could not have been made to account to his co-owner for his share of profits, he can be made to account because he is mortgagee of the other moiety as well as owner of that moiety which he absolutely possesses. There seems to me to be no ground at all for the contention that this gives the owner of the other moiety a better right than he would have had if instead of his being mortgagor he had been absolute owner.

For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed.

LORDS HALSBURY, MACNAGHTEN and SHAND concurred.

Order of the Court of Appeal and order of Romer J. affirmed, and appeal dismissed.

Lords' Journals 28th April 1893.

Solicitors for appellant: *Hulbert & Crowe.*
Solicitors for respondent: *Robinson & Turnbull.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1893
March 20.

ORR . . . . APPELLANT;

AND

MITCHELL AND OTHERS . . . . RESPONDENTS.

Conveyance—Sale of Superiority—General Words of Description in Dispositive Clause—Construction—Subsidiary Clauses—Right to Coals.

By the law of Scotland, the dispositive clause of a deed in implement of a sale of land rights is the governing clause, and if its terms are express and unambiguous they cannot be contradicted or cut down by inference drawn from other parts of the deed; but if the dispositive clause contain general words of description susceptible of more than one meaning, other clauses of the deed may be referred to as shewing the sense in which these general words are used.

The appellant raised this action for declarator that he was entitled to the exclusive right of the coals within the respondents' lands of "H.," "L.," and "B." These coals have never been worked. In 1796 the Duke of Argyle, then owner of the barony of which these lands formed a part, disposed of the dominium utile of "H.," "L.," and "B.," to the predecessor in title of the respondents, reserving the coals. The superiority of these lands, and the reserved coals, were acquired in 1808 from the Argyle family by C. T. By deed in 1837, C. T.'s trustee in bankruptcy, on the narrative, that he had offered for sale the "superiorities and feu duties" of these lands, conveyed by the dispositive clause, to the respondents' predecessor in title, the owner of the dominium utile, "all and whole the town and lands of 'H.,' with mosses, muirs, and all and singular pertinents used and wont, pertaining and belonging thereto, all as at present possessed by the said" respondents' predecessor. "L." and "B." were conveyed in somewhat similar words. In 1860 the barony with the coals were purchased by the appellant's predecessor in title from C. T.'s trustee:—

Held, reversing the decision of the majority of the whole Court of Session (19 Court Sess. Cas. 4th Series (Rettie), 700), that the estate of coal was not conveyed by the deed of 1837, the narrative clause shewing that the words "all and whole the lands" were meant to apply to the vassal's estate, and not to land and minerals belonging in fee to the superior.

Lee v. *Alexander* (8 App. Cas. 853) distinguished.

Fleeming v. *Howden* (6 Court Sess. Cas. 3rd Series (Macpherson), 782) approved.

APPEAL from a judgment of the majority of the whole judges of the Court of Session, Scotland (1).

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(1) 19 Court Sess. Cas. 4th Series (Rettie), 700.

H. L. (Sc.)
1893
Orr
v.
Mitchell.

The sole question in the appeal was whether, under a disposition dated the 28th of July, 1837, the coals in the lands of Hillfoot, Lochyfaulds, and the Bog, were conveyed to John McArthur Moir.

James Orr, the appellant, as general disponee of Sir Andrew Orr, raised this action, in 1890, for declarator (as limited by agreement) that he had the sole and exclusive right to the coals within these lands, under a deed of conveyance dated 1860, which granted the coals to Sir Andrew Orr. Coal had been worked prior to 1837 in other parts of the same barony; but no coal had been worked in these lands—therefore there was no question of possession by either party. Nevertheless, the appellant valued the coal at £15,000; and the respondents say there may not be any coal at all. No question in this appeal was argued as to the construction of the appellant's title, it being admitted at the Bar by the respondents that, if they had not right to the coal on their title, they had no interest in examining the appellant's title.

The lands of Hillfoot, Lochyfaulds, and the Bog formed part of the barony of Campbell in the parish of Dollar, Clackmannanshire. Previous to 1796, the Duke of Argyle, then superior and proprietor of the lands and barony of Campbell, granted the dominium utile of Hillfoot, Lochyfaulds, and the Bog to John Drysdale, but with reservation to himself, his heirs and successors, out of the grant of all the coals and coal heughs of the said lands, with full power to him and them to win the same. In 1796 John Moir became proprietor of Drysdale's right, and a charter of confirmation was obtained from the Duke of Argyle. This charter set out that John, Duke of Argyle, confirmed in favour of John McArthur Moir, &c., "All and haill the town and lands of Hillfoot, of old called the Eastertown of Hillfoot, with mosses, muirs, and all and singular pertinents used and wont, pertaining and belonging thereto, lying within the lordship of Campbell, parish of Dollar and sheriffdom of Clackmannan; as also all and whole the lands of Lochyfaulds, within the dykes betwixt the orchard on the west, the Broompark on the north, Bogyetts on the east, and Lochydubs on the south parts; as also all and whole these two small pieces of ground called the Bog, sometime possessed by John Drysdale, brewer in Dollar, bounded thus, viz., upon the east," &c. . . .; "*reserving* to the said John, Duke of Argyll, and his heirs and successors, all coals and coal heughs, of all and sundry the said lands respectively above written, with full power to them to win coals within any part of the same, excepting the houses and buildings erected or to be erected thereon, yards and orchyards upon the same." By disposition dated September and December, 1808, George, Duke of Argyle, sold to Craufurd Tait, of Harviestoun, his heirs and assigns, "All and whole these parts and portions of the lordship, barony, lands, and estate of Campbell following, viz., the lands of Banks of Dollar, Craiginnan, Brewlands, and Kirkstyle, with the mill of Dollar and mill lands, and teinds, parsonage and vicarage of the said lands, the coals of Dollar and Melloch, alias Sheardale, the lands of Over and Nether Mains of Dollar, Hillfoot, Sheardale, Craigend, and village of Dollar, which description is understood to comprehend the church lands of Campbell, otherwise Dollar or Gloum, called the ten pound land of Campbell, Burnside, and Eastertown, with the castles, towers, fortalices, woods, fishings, coals, coal heughs, and whole parts, pendicles, and pertinents which belonged to the late John, Duke of Argyll, in property or superiority at his death," . . . . "including the burgh of barony of the said lordship, barony, and estate of Campbell," &c.

Craufurd Tait's estates were sequestrated, and a trustee appointed in 1828. This trustee remainded feudally vested in the barony of Campbell down to 1837. The appellant alleged that in 1835 the lands of Harviestoun and Castle Campbell, with the coals therein, and under exception of the superiority of Hillfoot, and of the feu duty payable therefrom, were sold to the nominee of the Globe Insurance Company, but that no title was made up; and that in 1836 Craufurd Tait's trustee advertised for sale the superiority and feu duty of the lands of Hillfoot, &c.

On the 28th of July, 1837, Craufurd Tait's trustee granted a conveyance in favour of John McArthur Moir, the son and successor of John Moir, proprietor of Hillfoot, &c. The disposition having set forth the trustee's appointment, and vesting in him of Craufurd Tait's estates comprehending, inter alia, "the superiority and feu duty of the lands of Hillfoot and others lying in the parish of Dollar, belonging in property to John McArthur Moir of Hillfoot." . . . "Also considering that I, as trustee foresaid, having upon the 11th day of January last, 1837, exposed inter alia said superiority and feu-duty of the lands of Hillfoot to public roup and sale, the said John McArthur Moir offered for the same the sum of £450, and being the last and highest offerer, he was preferred to the purchase." . . . "And also considering that the said John McArthur Moir has since purchased from me by private bargain the superiority and feu-duty of the said lands of Lochyfaulds and others after disponed, and that at the price of £30." [This latter sale was to settle a dispute whether the sale of Hillfoot had included Lochyfaulds and others.] The deed then set out that these two sums and interest had been paid, and proceeded in the dispositive clause: "Therefore I, as trustee aforesaid, having sold," &c., "do hereby sell, alienate, and dispone from me and my successors in office or in the said lands and others to and in favour of the said John McArthur Moir, his heirs and assignees whomsoever heritably and irredeemably—All and Whole the town and lands of Hillfoot, of old called the Eastertown of Hillfoot, with mosses, muirs, and all and singular pertinents used and wont pertaining and belonging thereto, all as at present possessed by the said John McArthur Moir and his tenants: as also all and whole the lands of Lochyfaulds within the dykes betwixt the orchard on the west, the Broompark on the north, Bogyetts on the east, and the Lochydubs on the south parts: and also All and Whole those two small pieces of ground called the Bog, sometime possessed by John Drysdale brewer in Dollar," &c. "All as more particularly in the ancient, rights and infeftments thereof being parts and portions of all and whole the church lands of Campbell," &c., "lying within the lordship of Campbell," "in which lands and others above disponed, I, as trustee, hereby bind myself to infeft the said John McArthur Moir and his foresaids," "to be holden from me and my foresaids of and under our immediate lawful superiors of the same in the same manner and as freely in all respects as I, as trustee foresaid, my predecessors and authors held, hold or might have holden the same." The warrandice clause then followed, and contained this exception only—"Excepting always from this warrandice the feu rights or infeftments of property of the said lands granted by my predecessors and authors to the feuars and vassals thereof." The deed constituted John McArthur Moir, &c., the disponer's assignees to the whole suits, &c., and also to a before-mentioned charter of resignation or confirmation in favour of Craufurd Tait, under the Union seal (May, 1811), with the unexecuted sasine therein contained, "in so far as applicable to the town and lands of Hillfoot," and others disponed. "To the end that in virtue thereof and of the precept of sasine contained in said charter yet unexecuted, and of these presents, the said John McArthur Moir, or his foresaids, may be the more readily infeft and seased in the premises, and also in and to the whole feu-duties and other services and casualties payable from the said lands and others above disponed." . . . "Surrogating hereby, and substituting, with consent foresaid, the said John McArthur Moir and his foresaids in my full right and place of the premises for ever, which assignation above written, I, as trustee, with consent foresaid, bind and oblige myself to warrant from my own facts and deeds only." Following on this disposition, John McArthur Moir consolidated the property of Hillfoot, Lochyfaulds, and the Bog with the superiority conform to precept of resignation at remanentiam and instrument of resignation following thereon in his favour, recorded 1838. The respondents alleged that the price their author paid was forty years' purchase of the feu duty.

By contract of sale in 1859 Sir Andrew Orr agreed to purchase from Craufurd Tait's trustee the lands of Harviestoun and the barony of Campbell for £80,000. And by disposition dated 1860 the trustee conveyed to Sir Andrew Orr the whole lands of Harviestoun and Campbell acquired by him, viz., "All and whole those parts and portions of the lordship barony lands and estate of Campbell acquired by the said Craufurd Tait," . . . "including the lands of Hillfoot and pendicles of Lochyfaulds and the Bog, with all the coals, coal heughs, and others within the whole parts and pendicles, including the burgh or barony created as aforesaid, together with the coal in any of the lands to which Craufurd Tait had right at the date of his sequestration, and not since sold to any other party prior to the said contract of sale.

The warrandice clause excepted the feu rights and also the superiority and feu duties of the lands of Hillfoot, &c., sold to John McArthur Moir in 1837. This disposition was duly confirmed by the Crown. Sir Andrew Orr was succeeded by his general dispońee, James Orr, the appellant.

The appellant contended that the disposition of 1837 only conveyed the dominium directum of Hillfoot, Lochyfaulds, and the Bog to John McArthur Moir, and that the estate of coal within these lands was feudally left in the person of Craufurd Tait's trustee until 1860, when it was conveyed to his author.

During the argument, in answer to a remark of the Lord Chancellor, touching the unreasonableness of the respondents' claim, counsel read a letter of the 16th of January, 1837, from Craufurd Tait's trustee to John McArthur Moir: "It was also conditioned verbally at the sale that it was to include the coal and other minerals in these lands so far as the exposer had right thereto."

1890. Dec. 19. The Lord Ordinary (Lord Stormonth-Darling) decided against the appellant's claim.

1891. March 19. The Second Division ordered printed cases and arguments to be laid before all the thirteen judges of the Court of Session.

1892. March 18. The majority of the consulted judges affirmed the Lord Ordinary's decision.

The judges in the majority consisted of the Lord President (Robertson), and Lords Adam, M'Laren, Kinnear, Trayner, Kincairney, and Stormonth-Darling.

The judges in the minority were: Lord Justice Clerk (Macdonald), and Lords Young, Rutherfurd-Clark, Wellwood, Kyllachy, and Low.

On appeal:—

Feb. 14, 16, 17. *The Solicitor-General for Scotland* (*Asher*, Q.C.), and *A. Graham Murray*, Q.C. (with them, *A. J. M. Morison*), (all of the Scotch Bar), for the appellant:—

The words "all and whole the hands" in the dispositive clause may mean three things. They are the appropriate words for the conveyance of an estate of fee which would include the coals; but they are equally adapted to convey only the superiority or the dominium directum, and are also sufficient to transfer the beneficial use of the surface, the dominium utile. Therefore, inasmuch as the clause itself does not sufficiently explain its meaning, reference may be made to the narrative or any subsidiary clause; not to cut down or contradict the dispositive clause, but as evidence of the intention of the parties in adopting these words. Here the narrative clause sets out in the clearest language that the subject of the contract was only the superiority and feu duties of the lands in question, and was exclusive of a transaction dealing with the transfer of the property in the coals.

The majority of the Court of Session considered that the dispositive clause was so sacred that it could not be construed by anything outside the clause itself; but that view practically reverses *Fleeming* v. *Howden* (1). There the Lord President (Inglis) referred to the narrative part of the deed to discover what was the intention. In the *Duke of Hamilton* v. *Graham* (2) this House held that a mineral field reserved out of the grant of the dominium utile, or beneficial use of the surface, of the land, formed a separate and distinct feudal estate (3). See Lord Westbury (2). In *Lee* v. *Alexander* (4), Lords Watson and Blackburn, in the sentences relied on by the majority of the Court of Session, were dealing with the argument of the appellant in that case. And in that case, Lord Blackburn examined the narrative clause. In *Lord Advocate* v. *Sinclair* (5) Lord Cranworth said: "I do not question the general proposition, that nothing that is not mentioned in the dispositive clause can be held to pass merely because it is included in the tenendas clause." . . . "But in construing Crown charters, as well as all other written instruments, common sense suggests that we must look to the whole context of the instrument before we can say with certainty what is the true meaning of any particular clause in it." In *Forbes* v. *Livingstone* (1) a charter under the Clan Act conveyed the lands without reserving the coals, and this House remitted the case for the Court of Session to find whether possession of the coals, following on the charter, had been established. Here, no question of possession arises; but this House would not have remitted that case if the respondents' argument is sound.

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(1) May 21, 1868; 6 Court Sess. Cas. 3rd Series (Macpherson), 782.

(2) July 5, 1869; 7 Court Sess. Cas. 3rd Series (Macpherson), 976; On appeal, July 28, 1871; 9 Court Sess. Cas. 3rd Series (Macpherson), (H.L.), 98; Law Rep. 2 H. L., Sc. 166.

(3) This proposition was argued with success in *Livingstone Mitchell* v. *York House Building Society* (cited as *The Madiston Case*), March 21, 1777; (H.L.) Printed Cases; see also *Forbes* v. *Livingstone*, June 29, 1825; 1 Will. & S. App. 657; 1 Court Sess. Cas. 1st Series (Shaw), 2nd ed., 263; and on remit, 6 Court Sess. Cas. 1st Series (Shaw), 167; 3 Ross L. C. 342.

(4) 8 App. Cas. 853; 10 Court Sess. Cas. 4th Series (Rettie), (H.L.), 91.

(5) 5 Court Sess. Cas. 3rd Series (Macpherson), (H.L.), at p. 103.

The Lord Advocate (*J. B. Balfour*, Q.C.), (with him *Hay MacWatt*, of the Scotch Bar), for the respondents:—

At the date of the conveyance of 1837, Crawfurd Tait's trustee was vested in all the rights which Craufurd Tait had obtained from the Duke of Argyle, therefore Craufurd Tait's trustee had the estate in the coal. The deed of 1837 intended to convey all the reserved estate the trustee had. If he had a bare superiority only, then that only would have passed; but inasmuch as he had the estate in the coal, that passed also. It could not be denied that "all and whole the lands" were most appropriate words to carry the whole remaining property in Craufurd Tait's trustee, or, for that matter, the Duke of Argyle. By the law of Scotland the Crown is the highest superior, and the title of the Crown vassal is a title to the lands given under his Crown charter. Whether the superior sub-feu or not, his original title stands. The granter of a subaltern right if he desired to put a vassal in his own place, either as regards his whole estate or a part, would dispone "all and whole the lands" as they stood in his own title. Feudally, such a disposition would carry everything vested in the grantor a cèntro ad cœlum. And if the disponer desired to reserve anything out of the original grant to himself, he must reserve it. So the Duke of Argyle gave off feus and reserved nothing more than the coals, and the respondents' predecessor, John Moir, had everything but the coals. A reservation of any right by the superior caused a

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(1) 1 Will. & S. App. 657; 6 Court Sess. Cas. 1st Series (Shaw), 167; 3 Ross L. C. 342.

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separation from the vassal's tenement, but the reserved estate still remained a part of the original estate of the superior: see Lord Curriehill in *Bain* v. *Duke of Hamilton and Others* (1). And *Hutton* v. *Macfarlane* (2) supported Lord Curriehill's view.

There is no doubt that the Court in construing the dispositive clause is not confined to the words of that clause alone, neither do the majority of the judges so decide; but that clause, being the natural clause by which the grant is made, it is not to be contradicted or cut down by other parts of the deed. "All and whole the lands" have only one meaning, namely, all the estate remaining in the grantor. The warrandice clause, although carefully excluding feus from the conveyance, makes no mention of coals. Therefore it is an acknowledgment of the universality of the grant, for it shews that the conveyance of superiority was such a conveyance as included feus, and rendered necessary a reservation of feus. The narrative clause is not the part of the deed in which the grantor purports to act. But having made certain recitals in that clause did not prevent the grantor going on to give something larger in the dispositive clause, especially in regard to an estate of coal, when it was problematical whether it existed. Again, the word "superiority" might have been used in the sense of the whole estate of superiority quoad these lands.

[He also referred to *Chancellor* v. *Mosman* (3); *Erskine* v. *Schaw*, February 2, 1785 (4), and Bell's Lectures on Conveyancing, 3rd ed. p. 611.]

The Solicitor-General for Scotland, in reply:—

Erskine v. *Schaw* (4) seems to have been decided on specialities rather than on law.

Judgment after consideration.

LORD WATSON:—

My Lords, this appeal depends upon the construction of the dispositive clause of a deed of conveyance, dated the 28th of

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(1) 3 Court Sess. Cas. 3rd Series (Macpherson), at p. 827.

(2) 2 Court Sess. Cas. 3rd Series (Macpherson), 79.

(3) 10 Court Sess. Cas. 3rd Series (Macpherson), 995.

(4) Unreported until this case arose, see now 19 Court Sess. Cas. 4th Series (Rettie), n. p. 704.

July, 1837, executed in implement of a contract of sale by the trustee on the sequestrated estates of Craufurd Tait, in favour of John McArthur Moir of Hillfoot, the respondents' author. In that clause the principal subject conveyed is described as "All and whole the town and lands of Hillfoot with mosses, muirs, and all and singular pertinents used and wont pertaining and belonging thereto, all as at present possessed by the said John McArthur Moir and his tenants." Two other subjects, Lochyfaulds and the Bog, are by the same clause disponed in similar terms with this difference only, that they are described as having been formerly possessed by persons who do not appear to have been proprietors.

It is not matter of dispute that at the date of the conveyance in question the dominium utile of Hillfoot, Lochyfaulds, and the Bog was vested in John McArthur Moir, with the exception of the coal, which was reserved by the Duke of Argyle, then owner of the barony of Campbell, when he feued out these lands to a predecessor of Mr. Moir's in the beginning of the last century. The superiority of the lands and the reserved estate of coal continued to form part of the barony, which was acquired from the Argyle family by Craufurd Tait, and passed to the trustee in his sequestration.

In the year 1860, the lands and barony of Campbell were purchased from the trustee by the late Sir Andrew Orr, and are now feudally vested in the appellant as his testamentary disponee. This action has been brought by the appellant in order to have it found and declared that he has the sole and exclusive right to the coal in the respondents' lands of Hillfoot, Lochyfaulds, and the Bog; and they resist decree, on the ground that the coal reserved in the original feu rights was conveyed to John McArthur Moir by the disposition of the 28th of July, 1837. If that defence cannot be established, it was conceded in argument that the appellant must prevail.

Shortly stated, the case which was maintained by the respondents in the Courts below, and at the bar of the House, was this: that the dispositive clause of the deed of 1837 conveys the lands to their author in terms which must necessarily include the coal, and that these terms cannot be qualified or controlled by any expressions of intention occurring in other parts of the deed. The appellant, on the other hand, maintains that a conveyance of "all and whole the lands" may aptly signify either an estate of fee, or an estate of superiority, although the former may be its primary meaning; and that a conveyance in these general terms must be limited to a right of superiority, whenever it is clearly apparent, from the context of the deed, that such was the intention of the parties.

The Lord Ordinary assoilzied the respondents. On a reclaiming note to the Second Division their Lordships ordered cases to be prepared and laid before the judges of the Court of Session for their opinion. The Lord Ordinary, who was one of the consulted judges, adhered, with a slight variation, to the opinion which he had previously expressed in the note appended to his interlocutor under review. The remaining twelve judges were divided, six to six; and the judgment of the Lord Ordinary was affirmed by the Second Division, in conformity with the opinion of the majority of the whole Court.

When a disposition in implement of sale has been delivered to and accepted by the purchaser, it becomes the sole measure of the contracting parties' rights, and supersedes all previous communings and contracts however formal. Again, in ascertaining the subject to which the purchaser has acquired right, the dispositive is, according to Scotch law, the governing clause of the conveyance; and if its terms are express and unambiguous, they cannot be cut down by evidence of a contrary intention gathered from the context. If, for example, the deed of 1837 had expressly conveyed the lands of Hillfoot, "together with the coal therein," it would have carried the reserved coal to the disponee, although the context shewed that the parties meant to sell and buy a right of superiority only. Their Lordships had occasion to notice these principles, which are matter of trite law in Scotland, in deciding the case of *Lee* v. *Alexander* (1). But that case does not lay down the rule that, in arriving at the true meaning of a dispositive clause, all usual and legitimate aids to construction must be excluded. As was explained by Lord Rutherfurd Clark, one of the minority in the Court of Session, it only decides that the context cannot be referred to for the purpose of contradicting the terms of the dispositive clause. Or, as Lord Kinnear, one of the majority observed, "If the intention of the narrative were clearly repugnant to that of the dispositive clause, it is the latter that, according to the established canon of construction, must necessarily receive effect."

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(1) 8 App. Cas. 853; 10 Court Sess. Cas. 4th Series (Rettie), (H.L.), 91.

I doubt not that, in accordance with the canon, the reserved coal must be held to have passed to their author under the deed of 1837, if the respondents can shew that the expression "the lands of A," occurring in a dispositive clause, has in all circumstances and of necessity, precisely the same significance as "the lands of A together with the coal therein." Had Craufurd Tait's trustee sold the reserved coal to a third party before 1837, and the fact had been apparent on the face of the conveyance, he and the sequestrated estate would nevertheless in that view have been liable for breach of warrandice. If there were nothing else in the deed to expound their meaning, the words "all the lands" would include not only the surface, but all the strata below it, usque ad centrum. But there is, so far as I am aware, no authority for saying that these general words must always bear that meaning, and are incapable of being otherwise construed in the light of the context.

Fleeming v. *Howden* (1) is a direct authority to the contrary; and its weight is not lessened by the circumstance that Lord President Inglis, Lord Curriehill, and Lord Deas took part in its decision. In that case trustees vested with the superiority of certain lands, and also with the mines and minerals in these lands, which were reserved by the feu-rights, conveyed to the feuar, by a dispositive clause which contained no words of exception, all and whole the lands, together with all their interest, claim of right, property, and possession. From the narrative of the conveyance it appeared (1.) that the intention was to deal with the right of superiority only, and (2.) that the trustees had statutory authority to convey the superiority, but had no power to dispone the reserved minerals. In these circumstances, the First Division held unanimously that the general words of the dispositive clause must be restricted to the lands of which the dominium utile was vested in the disponee, and did not comprehend, the mines and minerals which belonged in fee to the superior.

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(1) 6 Court Sess. Cas. 3rd Series (Macph.), 782.

Counsel for the respondents agued that the decision in *Fleeming* v. *Howden* (1) went mainly on the want of power in the trustees to dispone aught except the right of superiority, an observation which is so far accurate. Their defect of power was regarded as an important element in ascertaining what was the real intention of parties, a question which must vary with the terms of the deed requiring to be construed ; but it had no bearing upon the real point of the decision, which consists in its recognition of the principle that evidence, sufficiently cogent, derived from other parts of the deed, of an intention to use them in a more limited sense than they primarily bear, will have the effect of restricting to their secondary meaning general words of description in the dispositive clause.

As might have been expected, counsel for the respondents did not admit that *Fleeming* v. *Howden* (1) was well decided. Even if I had entertained doubts as to its soundness, I would have hesitated to advise your Lordships after the lapse of twenty-four years from its date, to disturb the only precedent which is to be found in our reports upon this conveyancing question. But the decision appears to me to be in strict conformity with legal principle.

In the case submitted by them to the learned judges of the Court of Session, and also in their argument upon this appeal, the respondents relied upon an unreported decision of the Court, in the year 1785, in a case of *Erskine* v. *Schaw* (2). That case resembled the present, inasmuch as the question arose upon a dispositive clause which conveyed "all and haill the said lands of Gogar and Gartenclair," the disponee being feuar of the lands under exception of the coal, whilst the disponer was feudal owner both of the superiority and of the reserved mineral. It was held that the terms of the dispositive clause gave the disponee right not only to the superiority but to the coal also. The opinions expressed by the judges at final advising are only to be found in brief notes made by Islay Campbell, the future Lord President, who was of counsel in the cause. According to his notes four judges were for and two against the judgment. None of the judges of the majority rested their decision upon the ground that the general description in the dispositive clause was conclusive, with the exception of Lord Monboddo, who appears to have taken the untenable view that the superiority included not only the vassal's feu, but the estate of coal reserved to the superior. The rest of the majority were of opinion that it was the intention of the parties that the whole interest the disponer had in the lands, whether of superiority or of fee, was to be conveyed. The minority were of opinion that such was not their intention; that it was (to use the language attributed to one of them) " clear that not in view to dispose of the coal."

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(1) 6 Court Sess. Cas. 3rd Series (Macph.), 782.

(2) Now reported, 19 Court Sess. Cas. 4th Series (Rettie), n. p. 704.

In so far as concerns the competency of limiting the meaning of general words of description in a dispositive clause, which is a matter of law, the principle recognised by the learned judges in *Erskine* v. *Schaw* (1) appears to me to differ in no respect from that which was followed by the First Division in *Fleeming* v. *Howden* (2). In cases to which the principle applies, it does not occur to me that the question whether the context affords evidence of intention sufficiently clear to restrict, and if so, to what extent, the language of the dispositive clause can be usefully solved by reference to precedents. Each case must in that respect be decided upon its own merits. One limitation must always be observed; which is, that evidence of intention, however clear, cannot be permitted to impose upon the words of the dispositive clause a meaning of which they are not susceptible.

Applying what I conceive to be the principle of *Fleeming* v. *Howden* (2) to the deed of the 28th of July, 1837, I cannot say that I entertain any doubt as to the true meaning of the dispositive clause. The narrative expressly bears that John McArthur Moir purchased the superiority and feu-duty of his subaltern estate and nothing else, and that the deed was executed for the sole purpose of giving him a feudal title to these subjects. There is no special mention of the reserved coal. It is not included in

(1) Now reported, 19 Court Sess. Cas. 4th Series (Rettie), n. p. 704

(2) 6 Court Sess. Cas. 3rd Series (Macph.), 782.

the lands described as Hillfoot and others; but is comprehended in the general description of "the lands and estate of Campbell," which are stated to belong to the disponer. The only lands referred to in the narrative as "the lands of Hillfoot and others" (a description which comprehends Lochyfaulds and the Bog), are specially described as "belonging in property to John McArthur Moir of Hillfoot," the disponee. These statements occurring on the face of the deed itself, afford, to my mind, irresistible evidence that the words of the dispositive clause were only meant to apply to the vassal's estate which had previously been described as the lands of Hillfoot and others, and were not meant to comprehend land or minerals belonging in fee to the superior, which had been previously included in the general description of the barony of Campbell.

Being of opinion, for these reasons, that the interlocutors appealed from ought to be reversed, I do not find it necessary to consider at length the limitation of the general words of the dispositive clause which may be implied in the expression "all as at present possessed by the said John McArthur Moir and his tenants." The limitation does not apply either to Lochyfaulds, or to the Bog; but, in my opinion, it is in itself sufficient to exempt from the operation of the clause, the coal in Hillfoot, which had never been worked by the disponee or his predecessors in the feu, and could not be constructively possessed by them, in the absence of title.

I have thought it necessary to explain my own views of this case, because of its importance to the law, and the difference of opinion which it elicited in the Court of Session. But I desire to express my concurrence in the opinions delivered by the judges of the minority, and particularly in the exhaustive judgment of Lord Rutherfurd Clark.

LORD HERSCHELL, L.C.:—

My Lords, I have had an opportunity of reading the opinion expressed by my noble and learned friend Lord Watson, and entirely agree with it. I desire to add only a few words.

No authority has been cited which establishes that according to the law of Scotland, where a provision contained in a deed has to be construed, it is not legitimate to look at the whole deed in order to determine what is the true construction of the provision in question. In the absence of such an authority, I am of opinion that light may properly be sought from every part of the deed, though I do not, of course, say that every part of it is of equal weight. Where by a dispositive provision a subject is conveyed in terms clear and unambiguous, and which admit of but one meaning, it would not be right to hold that something less was conveyed because either the recitals or other parts of the deed appear to indicate that this was the intention of the parties. But where language is employed which may appropriately be used for different purposes, or which has a wider or more restricted sense, I think it is perfectly legitimate to look to other parts of the deed to see how it was intended to be used in the dispositive clause, or whether it has there such wider or more restricted sense. These are the principles I have applied to the solution of the question which has to be determined by your Lordships. My noble and learned friend's opinion, sufficiently indicates the course of reasoning which has led me to agree with the conclusion arrived at by the six learned judges who formed the minority in the Court below.

My noble and learned friend, Lord Hannen, whose public duties prevent his being present to-day, has asked me to say that he concurs in the conclusion at which the rest of your Lordships have arrived.

I therefore move your Lordships that the interlocutors appealed from be reversed. That it be declared that the appellant is entitled to a decree of declarator, that he has the sole and exclusive right to the coals within the lands mentioned in the terms of the summons. That the case be remitted to the Court below, with that declaration; and that the respondents do pay the costs of this appeal and the costs in the Court below.

LORD ASHBOURNE:—

My Lords, I have had an opportunity of reading and considering the judgment which has just been delivered by my noble and learned friend on my right (Lord Watson), and I entirely concur in it.

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LORD MACNAGHTEN :—

My Lords, I should not have troubled your Lordships with any observations if it had not been that in the arguments before the Court of Session and in one at least of the opinions delivered there, the case of *Lee* v. *Alexander* (1) was treated as laying down a canon of construction favourable to the respondents' contention. It does not appear to me that their contention can derive any support from anything that was said in *Lee* v. *Alexander* (1), or that any exception can be taken to the way in which a well-known canon of construction is stated in that case.

As regards the question before your Lordships, the canon of construction applicable to deeds of conveyance must be the same whether the question arises in Scotland or in England.

When the words in the dispositive or operative part of a deed of conveyance are clear and unambiguous they cannot be corrected by reference to other parts of the instrument. When those words are susceptible of two constructions the context may properly be referred to for the purpose of determining which of the two constructions is the true meaning. In order to justify a reference to the context for this purpose, it is not necessary that the language of the dispositive or operative clause should be ambiguous in the sense that without some help you cannot tell which of two meanings should be taken. The rule applies though one of the two meanings is the more obvious one, and would necessarily be preferred if no light could be derived from the rest of the deed. For the purpose of construing the dispositive or operative clause, the whole of the instrument may be referred to though the introductory narrative or recitals leading up to that clause are, perhaps, more likely to furnish the key to its true construction than the subsidiary clauses of the deed.

In the deed of the 28th of July, 1837, the dispositive clause (omitting the qualifying words "all as at present possessed by the said John McArthur Moir and his tenants") is susceptible of two meanings. It is the usual and proper clause for conveying an estate of superiority, and it is also framed in the proper way for conveying the lands and all within them. If there were

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(1) 8 App. Cas. 853; 10 Court Sess. Cas. 4th Series (Rettie), (H.L.), 91.

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nothing to throw light upon the meaning of the parties the latter construction would undoubtedly be preferred. But the words "all as at present possessed by the said J. M. Moir and his tenants" qualify the sentence which precedes them. Those words are, I think, clear and unambiguous; that is to say, when you have ascertained what lands answering the description of "the town and lands of Hillfoot" were immediately before the disposition possessed by Moir and his tenants, the subjects to which the disposition applies are clearly defined. The word "possessed" is not a word of technical meaning. It must be taken in its ordinary signification. But one thing is clear. There is no sense in which it can be said that Moir or any tenant of his was possessed of the reserved coal within the lands in question. That is not suggested on behalf of the respondents. What they say is that the words are merely demonstrative, and simply denote the boundaries of the property or the extent of the surface in the visible possession of Moir and his tenants. That seems to me, with all deference, to be a very forced and unnatural meaning to attribute to the words in question. And it is perhaps a little inconsistent to say that the language of the dispositive clause must be construed so strictly that you are to shut your eyes to any light that the rest of the deed may afford, and at the same time to treat an integral part of that clause as conveying only a faint and imperfect impression of its full and proper meaning.

If those qualifying words had applied to all the subjects disponed it would not, I think, have been necessary to have referred to the context at all. They do not, however, apply, to the lands of Lochyfaulds and some other small pieces of ground, all of which at one time belonged to Hillfoot, and were at the date of the disposition in the possession of Moir. It becomes, therefore, necessary to turn to the narrative for the purpose of seeing whether a distinction was intended to be made between the lands of Hillfoot and the other lands contained in the disposition. It seems to me clear that there was no such intention. On the narrative taken by itself it is plain that the subject sold and the subject intended to be disponed was an estate of superiority only, and that all the lands referred to, and intended to be dealt with, were lands belonging in property to Moir. It seems, therefore, to be the fair and necessary inference that the words "all as possessed by J. M. Moir and his tenants" were not introduced for the purpose of drawing a distinction between the reserved coal within the lands to which those qualifying words apply and the coal within the other lands specified in the dispositive clause. But being introduced as a definition of the lands of Hillfoot without any such special object they do shew, I think, very clearly that the intention of the parties in the dispositive clause was the same as the intention apparent on the face of the narrative; and the effect of their presence is not, I think, to be limited to the lands of Hillfoot only.

LORD FIELD:—

My Lords, the great conflict of opinion between the learned judges of the Court of Session would seem to show that the case is not unattended with difficulty. But the very clear and complete exposition of the arguments and reasoning upon which the differing judgments of their Lordships rest, has enabled me to estimate them and follow them, and I have come to the conclusion that the reasoning of the minority ought to prevail, and that the judgment of the Court of Session cannot therefore be supported.

The question is, as your Lordships are already aware, whether the coals in the lands comprised in the disposition of the 28th of July, 1837, passed by that deed to the respondents' author. There is no doubt that at the date of it, and before its execution, these coals were vested in the disponer Scott, the trustee of the estates of Craufurd Tait, as a separate tenement, and as part of the barony and estate of Campbell, or that he was also entitled to the superiority and feu duty of those lands which, except the coals, belonged in property to the respondents' author. It is equally clear that the superiority and feu duty had been purchased by the latter, either by public roup or private bargain, and that the disposition of 1837 was executed for the purpose of implementing those purchases, and I think those purchases only. But it is also, I think, clear that the language of the dispositive clause is sufficiently large in itself, and taken by itself, to have included the coals; and, therefore, if I had been compelled to have regard to that clause alone, I should have been obliged to hold that the coals did pass, whatever might have been my view as to the real intention of the parties, apart from the deed. Certainly, I should have also done so, and willingly, if the dispositive clause in the deed, or the deed in any other part, had contained language expressly, or by necessary implication, referring to the coals as part of the disponed property. I agree that clear and unambiguous language of a dispositive clause cannot be cut down by other language, leading to a contrary intention. But then (and this is where I differ from the majority of the Court of Session), it seems to me that the language of the clause, although habile to pass the whole tenement from the sky to the centre of the earth, is equally habile, having regard to the practice of conveyancing, and to what I understand to be the legal theory as to lands which have been feued remaining within the title of the superior, to pass the mere superiority and feu duty, of which the excepted coals form no part, for they are part of the original proprietorship of the whole barony.

I need not trouble your Lordships with a further expression of my views, for they have been clearly and fully expressed to your Lordships by my noble and learned friends who have preceded me; but the result is that of the two possible interpretations of the language of the dispositive clause, the narrower one is the true one; and this view has the great advantage of carrying out what, I am quite satisfied, was the real intention of the parties.

Ordered, that the interlocutors of the 19*th of December,* 1890, *and the* 18*th of March,* 1892, *appealed from be reversed: Declared that the appellant is entitled to a decree of declarator, that he has the sole and exclusive right to the coals within the lands mentioned in the summons, as restricted by minute of restriction for the appellant No.* 122 *of process, and that the appellant has power to work and win the said coals in terms of and subject to any conditions contained in the titles of the appellant and respondents: And it* *is further Ordered, That with this declaration the cause be, and the same is hereby remitted to the Second Division of the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment and this declaration: And it is further Ordered, That the respondents do pay the costs of the action in the Court below, and the costs of this appeal.*

Lords' Journals, 20th March, 1893.

Agents for appellant: *Grahames, Currey, & Spens, for Alexander Morison, S.S.C., Edinburgh.*

Agent for respondents: *Andrew Beveridge, for Carmichael & Miller, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1893
May 18.

PROVOST, &c., OF GREENOCK . . . APPELLANTS;

AND

THE REV. DAVID S. PETERS . . . . RESPONDENT.

Church—Contract—Minister's Stipend—Obligation to provide a legal and competent Stipend not under a certain Sum—Extent of Obligation—Surplus from Seat Rents—Trust.

By decree of the Teind Court dated the 15th of July, 1741, obtained at the instance of the baron baillie and certain of the feuars of the burgh of Greenock, for themselves and in the name of its whole inhabitants, the burgh was disjoined and erected into a new parish. The sum of £1000 had already been subscribed and invested in heritable security for the purpose of building a kirk for the new parish and endowing the minister with a competent stipend of not less than 950 merks; and the pursuers had likewise undertaken to contribute certain yearly sums for a period of fifteen years in order to complete a fund for the stipend.

These facts were fully set out in the summons, but were not referred to either in the conclusions of the summons or in the decree, which simply ordained the baillie, feuars, and inhabitants of the burgh to provide the minister of the new church with a competent legal stipend not under 950 merks:—

Held, affirming the decision of the Court of Session (19 Court Sess. Cas. 4th Series (Rettie), 643), that the decree of the Court of Teinds imposed a direct liability upon the burgh of Greenock to pay the minister a competent and legal stipend according to the varying circumstances from time to time, and that a minimum payment of 950 merks would not fulfil the obligation; nor was the obligation impaired by any loss of the funds or deficiency in the expected contributions.

APPEAL against a judgment of the Second Division of the Court of Session, Scotland (1).

The Rev. David S. Peters, the respondent, raised this action against the provost and magistrates of the burgh of Greenock and others, the appellants, for declarator, inter alia, that the pursuer, as the minister serving the cure of the new or mid-parish church and district thereof within the burgh of Greenock, was and is entitled to be provided by the defenders with a competent and legal stipend to be paid out of the revenue of the burgh, or out of the funds, &c., held by the magistrates for the special use of the minister serving the cure of the said church, from the date of his induction, and in all time coming and serving the cure. There was also a conclusion for payment of £320 per annum from 1880 to Martinmas, 1890, under deductions of payments to account, and of £400 as competent and legal stipend from Martinmas, 1890, or such other sum less or more as in the circumstances appear as a competent and legal stipend. This latter conclusion was not dealt with in the appeal.

The respondent founded upon the terms and meaning of a decree of erection of the new or mid-parish church by the Teind Court in 1741. The facts are given in the opinion of Lord Herschell, L.C. It need only be added that the appellants stated the increase of stipend, noted below, had been uniformly granted and accepted on the express statement that they were personal to the particular incumbents who received them; that about fifty years ago the magistrates described in their minutes a sum of £120 as legal stipend; and that they are entitled out of the funds in their hands to pay the minister additions to that sum, such being voluntary additions made by them in the exercise of their discretion for the good of the benefice. It appeared also that the stipend under legal stipend and voluntary additions amounted to £295 from 1793 to 1836, £220 from

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(1) 19 Court Sess. Cas. 4th Series (Rettie), 643.

1843 to 1861, and £320 from 1861 to 1873; that the respondent became minister in 1877, the stipend for the two first years being respectively £385 and £355, and the average since £298 17*s.* 1*d.* In 1873 the magistrates of Greenock passed a resolution that the next minister should have besides the manse £120 per annum, and as a supplement personal to the minister the balance of the seat rents, after providing for (1.) that £120, (2.) the communion element money, and (3.) the cost of maintaining the church and manse so far as such cost exceeded £50, which £50 was to be paid by the magistrates.

The contention that the obligation of 1741 had not descended on the appellants was not insisted in at the Bar.

The Lord Ordinary (Kyllachy), on the 23rd of June, 1891, pronounced an interlocutor finding that the obligation libelled in the decree of disjunction and erection of 1741 was binding on the defenders, and that they were bound to provide the pursuer and his successors in the new or mid-parish church of Greenock with a legal and competent stipend suited to the circumstances of the time and the position and duties of the benefice. His Lordship quoad ultra appointed the cause to be enrolled, in order that the parties might be heard as to the petitory conclusions of the summons. On the 16th of March, 1892, the Second Division (Lord Young dissenting) adhered (1).

On appeal,

Feb. 21, 23. *The Lord Advocate* (*J. B. Balfour,* Q.C.) and *J. David Sym* (of the Scotch Bar), for the appellants:—

The arrangement made in 1741 by the heritable bond and the product of the voluntary tax for fifteen years is the extent to which the burgh of Greenock is legally liable; therefore they were not bound to give more than the interest therefrom or 950 merks. There was no doubt it might be appropriate to add voluntarily to the stipend, and this the burgh has done. *Magistrates of Kilmarnock* v. *Aitken* (May 31, 1849) (2) decided that it was not ultrà vires of magistrates of a burgh to appropriate part of the common funds to the endowment of a parish church in connection with the Church of Scotland. And it was held in *Magistrates of Dundee* v. *Nicol* (Nov. 18, 1829) (1) that voluntary payments, made and accepted as such, do not grow into a legal right. In considering whether the managers of the fund in 1741 could undertake such an obligation as is claimed here, so as to bind their successors, it must be remembered that from 1707 to 1784 it was held that once there had been an augmentation there could not be another augmentation; see note to Erskine, 2, 10, 46. In 1784 (2), and again in 1789, in *Mitchell* v. *Officers of State* (3), this House decided that a second augmentation could be obtained by the minister. After these cases the Act 48 Geo. 3, c. 138, enacted that there must not be a second augmentation within twenty years. As to the words "competent and legal." In the Act 1581, c. 100, the words "sufficient and competent" appear; see also Act 1617, c. 3; 7 & 8 Vict. c. 44. The word "legal" does not appear in these Acts, but must mean, what would satisfy the law.

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(1) 19 Court Sess. Cas. 4th Series (Rettie), 643.

(2) 11 Court Sess. Cas. 2nd Series (Dunlop), 1089.

[They also cited, *Presbytery of Dundee* v. *Magistrates of Dundee* (March 19, 1858) (4); *Cæsar* v. *Magistrates of Dundee* (June 9, 1848) (5); *Magistrates of Dundee* v. *Taylor & Grant* (March 20, 1863) (6); and the aliment cases of *Maule* v. *Maule* (7), *Thom* v. *Mackenzie* (Dec. 2, 1864) (8).]

A. Graham Murray, Q.C., and *John F. M'Lennan* (both of the Scotch Bar), appeared for the respondent, but were not called upon.

Judgment after consideration.

Lord Herschell, L.C.:—

My Lords, in this action the respondent sought to obtain a declaration that, as minister serving the cure of the new or mid-parish church within the burgh of Greenock, he was entitled to be furnished and provided by the defenders, and that they were bound to furnish and provide him with a competent and legal stipend to be paid out of the revenue of the burgh.

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(1) 8 Court Sess. Cas. 1st Series (Shaw), 66.

(2) See *Milligan* v. *Heritors of Kirkden*, 2 Pat. App. 621.

(3) 3 Pat. App. 140.

(4) 20 Court Sess. Cas. 2nd Series (Dunlop), 849; affirmed 4 Macq. 228.

(5) 20 Court Sess. Cas. 2nd Series (Dunlop), (note), 859.

(6) 1 Court Sess. Cas. 3rd Series (Macpherson), 701, at p. 703.

(7) 1 Wills. & Shaw App. 266.

(8) 3 Court Sess. Cas. 3rd Series (Macpherson), 177.

The claim of the respondent was founded on a decree of disjunction and erection dated the 15th of July, 1741. Prior to that date there had been only one parish and one church in the town of Greenock.

The action of disjunction and erection was raised before the Court of Session as commissioners appointed for the plantation of kirks and valuation of teinds. The pursuers were the Baron Bailie of Greenock and certain other persons, all feuars, for themselves and in name of the whole of the other feuars and inhabitants of the town of Greenock. The defenders were Sir John Shaw, Lord of the Barony of Greenock, and other persons. The summons stated that, owing to the increase of the town of Greenock, which formed part of the parish of Greenock, the erection of a new kirk had become necessary, and was much desired by all the inhabitants thereof, who had provided a sufficient fund for building a new kirk and endowing the minister with a competent stipend; not less than 950 merks for stipend and fifty merks for communion elements, towards which the pursuers had already laid out upon heritable security on the lands of Kirk Machaell the sum of £1000 sterling, and had bound themselves by contract to pay certain contributions yearly for fifteen years, which would be sufficient to complete a fund for the stipend and to defray the expense of building a church.

By a Charter of the 30th of January, 1741, Sir John Shaw had granted to the feuars and sub-feuars of the burgh of the barony of Greenock to elect nine persons (the baillie or baillies being always of the number) to be managers and administrators of the whole of the funds belonging to the burgh.

The managers so appointed were the pursuers in the action, to whom on the 7th of February, 1741, Sir John Shaw had granted a heritable bond for the sum of £1000 "in trust for themselves and the whole other feuars and householders of the said burgh of barony, and of the new parish of Greenock, when the same shall be erected, in order to be applied for the special effect and purpose of being part of the benefice of the said parish, when, or in case it shall be erected, and in trust, that such erection being once legally made, the forsaid persons, or survivor of them, shall denude themselves by assigning and disponing the said bond in security to and in favour of the minister who shall be first settled in the said new erected parish, and to his successors in office in all time coming during the not redemption or until payment, to the intent that such minister and his successors in office may receive the rents and profits thereof during their respective incumbencies." This was the heritable security referred to in the passage of the summons which I have quoted.

By its decree the Court separated and disjoined a specified part of the town of Greenock, and erected the same into a new and separate parish. It conferred on the Baillie of Greenock and managers of the fund for building and endowing the church, and the feuars and elders of the new-erected parish for the time being, the right of patronage of the new church, and the modelling and disposing the said church and haill seats thereof, and bounds within the same, and the settling and uplifting rents for the said seats, and the naming and appointing of beadles, bellman, or doorkeepers to the new church, and the readers, precentors, and clerks for the kirk and sessions thereof, and disposing, during any vacancy, of the fund which should be provided by them for a stipend to their minister. The decree also decerned and ordained "that the Baillie, feuars, and inhabitants of the said burgh be bound and obliged, not only to defray the expense of erecting, building, and repairing such kirk, manse, and schoolhouse and other parochiall burdens, but also to provide the minister of the new church so to be erected with a competent and legall stipend not under 950 merks, with fifty merks for the communion elements."

This is the obligation which the respondent is now seeking to enforce against the appellants.

It appears to have been argued in the Court below that the obligations imposed by this decree (whatever they were) have not descended on the appellants; but the point was not pressed at the Bar, and there appears to be no doubt that they have succeeded to those obligations. The question to be determined is, What is the nature and extent of the obligation imposed by the words which I have last quoted from the decree?

It was contended on behalf of the appellants that they were under no legal liability to do more than pay to the respondent, as minister of the church, the minimum sum of 950 merks mentioned in the decree. The respondent, on the other hand, maintained that they are bound to provide him with a "competent and legal stipend," whatever they may amount to, according to the varying circumstances from time to time.

It was argued that the authorities of the burgh could not, in the year 1741, lawfully undertake such an obligation as this so as to bind their successors. I cannot concur in this view. The town could not of itself have erected the new parish. It was necessary for that purpose to resort to the Court of Teinds, and that Court was, I think, entitled to make it a condition of the decree of disjunction and erection that proper provision should be made for the stipend of the minister. It is to be observed that the right of uplifting the rents for seats in the church was conferred on the burgh; and these seat rents have been continuously received by the municipal authorities down to the present time. The burgh also received the £1000 secured by the heritable bond, and that sum was applied in discharging the debts of the town.

The only further question involved appears to me to be the true construction of that part of the decree which relates to the provision of a legal and competent stipend.

I do not think that the actings of the municipal authorities since the date of the decree assist much in the solution of the question to be determined. Additions were from time to time made to the amount of the stipend originally paid, but these additions were always strictly limited to the term of the incumbency of the minister to whom it was agreed to make the payment.

I am unable to accede to the argument which found favour with Lord Young in the Court below, that we have to deal merely with the case of a trust, and that the appellants' only legal obligation is to pay to the minister the interest on the sum received in respect of the heritable bond and the other moneys, if any, which came to their hands for the endowment of the church. Their duties are not, I think, regulated by the terms of the trust declared by the heritable bond. The decree of disjunction and erection, in my opinion, sanctioned and gave legal authority to a new arrangement, and the obligations of the baillies, feuars, and inhabitants of the burgh were thereafter measured and ascertained by the terms of the decree.

On the best consideration I have been able to give to the case I have come to the same conclusion as the majority of the Court below. Having regard to the right which was conferred of uplifting the seat rents, and to the fact that there was no provision as to the mode of application of the moneys thus received, I do not think it would be reasonable to hold that, however much circumstances might vary, the stipend was unalterably fixed at the date of the decree, and that whatever the seat rents amounted to the burgh would have discharged its obligation by paying to the minister the sum of 950 merks per annum.

In a process of modification brought in December, 1708, the minister in his libel concludes for "a competent fixed legal stipend suitable to the weight of the charge and circumstances of that paroch and the extend of the free teinds" (1 Connell, Law of Tithes, p. 413). The legal and competent stipend could not of course in that case exceed the amount of the teinds, but the use of the expression in such a process in the Court of Teinds throws light, I think, upon the sense in which the words are used in the decree of that Court pronounced in 1741. Indeed, if the only liability intended to be imposed was the payment of a sum of 950 merks a year it is not easy to see why the words "legal and competent stipend" should have been introduced at all.

The only authority upon the construction of the language found in the decree is the decision of Lord Wood in the case of *Cæsar* v. *Magistrates of Dundee* (1), which was in accordance with the judgment pronounced by the Court below.

For these reasons I am of opinion that the interlocutors appealed against ought to be affirmed, and the appeal dismissed with costs.

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(1) 20 Court Sess. Cas. 2nd Series (Dunlop), (note), 859.

Lord Watson:—

My Lords, at the Bar of the House, the appellants did not dispute, as they seem to have done in the Courts below, that they are bound by the decree of the Court of Teinds, dated the 15th of July, 1741; and that the nature and extent of their obligations to the respondent depend upon the construction of its terms. But, on that assumption, they argued that the effect of the decree is, either to make them trustees of a capital sum of £1000, the respondent as present beneficiary being entitled to the interest arising from it; or otherwise, to impose upon them an absolute obligation to pay him the sum of 950 merks yearly, with power to them, in their discretion, to withhold any further payment, or to make such additional payment as they may think fit.

The theory of a trust appears to me to be unwarranted by the terms of the decree. The summons of disjunction and erection, upon which it proceeded, narrated the fact that £1000 had been subscribed and invested in trust for the purpose of securing a stipend to the minister of the new parish; but it was not represented to be sufficient for that purpose. On the contrary, it was stated that certain persons had bound themselves to pay a yearly contribution for fifteen years, which would be sufficient "to compleat a fund for the stipend." No one conversant with the practice of the Teind Court can suppose that their Lordships would have erected a new parish quoad omnia, with no better security for the future sustenance of the holder of the benefice. These statements appear to have been introduced with the view of giving the Court some assurance that the municipality would be able to fulfil the obligations which they offered to undertake. No reference was made, in the conclusions of the summons, to which they asked the Court to give effect, either to the trust fund or to contributions. The only conclusion relating to stipend was that "the baillie, feuars, and inhabitants of the said burgh" should be bound and obliged "to provide the minister of the kirk so to be erected with a competent and legall stipend not under nine hundred and fifty merks, with fifty merks for the communion elements, payable at two terms in the year—Whitsunday and Martinmas—by equall portions." The operative decree of the Court was in the precise terms of that conclusion. It imposes a direct obligation upon the burgh, which could not be impaired by the loss of the trust fund, or by any deficiency in the expected contributions.

The language in which the obligation is expressed does not favour the suggestion that the minister's stipend was to consist of 950 merks, it being left to the burgh managers to determine whether they would or would not make a farther allowance. I can hardly conceive that the Court of Teinds would have described an income of which the sufficiency was to be dependent on the goodwill of the municipality as a competent legal stipend which they were "bound" to provide; or that the Court meant to give the seat rents to the burgh without any obligation to apply the surplus towards augmenting the stipend, which is the contention of the appellants. I agree with the construction which was put upon a similar clause of obligation by the late Lord Wood in *Cæsar* v. *Magistrates of Dundee* (1), not because it is an authority binding upon the Court, but in respect that it appears to me to be in consonance with the intention and the practice of the Court of Teinds.

The authorities relied on by the appellants had really no bearing upon the point arising for decision in this appeal. *Maule* v. *Maule* (2) is the leading authority upon the question to what extent the heir in possession of an entailed estate is bound to aliment his eldest son and heir-apparent, a question involving very different considerations from those upon which the amount of a competent and legal stipend to a minister depend. The ground of decision in that case was, that the allowance made to the pursuer was in full, if not in excess, of what his father was legally bound to give him. But it was neither pleaded, nor suggested, that the action was excluded, or that the Court was incompetent to determine whether the aliment afforded was sufficient.

I shall say no more, because I fully concur in all the reasons which have already been expressed by the Lord Chancellor.

Lord Field, who is unable to be present, desires me to state that he entirely approves of the judgment proposed.

(1) 20 Court Sess. Cas. 2nd Series (Dunlop), (note), 859.

(2) 1 Will. & S. App. 266.

H. L. (Sc.)
1893
Provost, &c., of Greenock v. Peters.

LORD ASHBOURNE:—

My Lords, I concur. I have had an opportunity of reading the opinion which has been delivered by my noble and learned friend on the woolsack, and I entirely concur in the conclusion at which he has arrived, and in the reasons upon which he has based his opinion.

LORD MACNAGHTEN concurred.

Ordered that the Interlocutors appealed from be affirmed; and the appeal dismissed with costs.

Lords' Journals, 18th May, 1893.

Agents for appellants: *Durnford & Co., for Cumming & Duff, S.S.C., Edinburgh.*

Agents for respondent: *Harvey & Capron, for Miller & Murray, S.S.C., Leith.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1893
June 16.

McINTYRE BROTHERS . . . . APPELLANTS;

AND

McGAVIN AND OTHERS . . . . RESPONDENTS.

River—Pollution—Prescriptive right, Extension of—Concurrent Findings of Fact.

A riparian proprietor who has a prescriptive right to take, in a particular way and at a particular place, water from a river and to return such water to the river in a polluted condition, is not entitled to take the water in any other way or place, nor use even his common law right of taking it in such a way as to add to the pollution of the stream.

APPEAL from interlocutors of the Second Division of the Court of Session, Scotland (1), affirming the decision of the Lord Ordinary (Trayner).

This was an action of suspension and interdict raised at the instance of Robert McGavin, Lord Dalhousie, Messrs. Watson & Shield, Alexander Anderson, and others, the respondents, against McIntyre Brothers, the appellants. The interdict sought to have the appellants interdicted (5.) from abstracting the water of a river called the Dighty or Fithie, or either of them; (6.) from detaining and arresting the water of the said streams, or either of them, and preventing the same running uninterruptedly and continuously in its natural course through or past the complainers' lands; (7.) from using any conduit, aqueduct, or other opus manufactum, whereby the water of the said stream or streams may be made to regorge into tanks or reservoirs at the appellants' works, and there to be detained or arrested for use in their processes of bleaching or otherwise, and may be prevented from continually running in the said bed or alveus through or past the complainers' lands; (8.) from discharging any refuse from their bleach works, or other deleterious and noxious and impure stuff of any kind into the said stream or streams whereby they may be polluted or rendered unfit for agricultural and manufacturing purposes, or its amenity diminished, &c.; and further, to ordain the appellants to remove all tanks, boxes, pipes, drains, or other opera manufacta erected or placed by them in or upon the alveus or bed of the said stream or streams, and to fill up all excavations, and restore the said alveus to the state it was in prior to the operations of the appellants.

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(1) 17 Court Sess. Cas. 4th Series (Rettie), 818.

The appellants are the proprietors of bleaching works on the River Dighty. This river runs from west to east, and forms the northern boundary of the appellants' property. The Dighty has been used for many years for the purposes of public works, chiefly bleachfields, of which there are several above the appellants'; necessarily, therefore, its water, as it passes the appellants' works, is very impure. On the north side of the Dighty, and opposite the eastern extremity of the appellants' lands, the Fithie, a pure-water stream, joins the Dighty, the volume of the Fithie being about one-third of the Dighty.

The property of the respondent McGavin is bounded by the Dighty on the south and by the Fithie on the east, and lies ex adverso the appellants' lands.

The respondents, Watson & Shield, are the occupiers under

Lord Dalhousie of the Panmure Bleachfield, situate two miles lower down the stream, and they take their water from the combined streams under the name of the Dighty.

The operations complained of consisted of a box four feet by two feet, sunk six inches below the level of the bed of the river, at a point where the Fithie flows into the Dighty. This box had a grating on the north side facing the Fithie. From the box was led a conduit in the bed of the river, across to the appellants' bank, and joined a pipe-track laid within the appellants' property along the bank of the Dighty, and so graded as to conduct the water by gravitation to a well some 400 feet back at the appellants' works. From this well it was pumped to the appellants' storing-tanks for use. When the works were not working the well became full and water ceased to come in from the Fithie. This water was used by the appellants in their bleaching works, and was ultimately returned in a polluted state to the Dighty at a point higher up than that at which it was taken in.

It appeared that in August, 1887, a larger box was put down in the stream, which, without doubt, encroached a little on McGavin's side of the centre of the river, but that was removed in July, 1888. In the same summer the box complained of in this action was placed by the appellants, but nearer their own bank; and they alleged that taking the centre of the Dighty the box would be nine inches on McGavin's side, but taking the centre of the bed of the combined streams, which was the correct mode of measurement, the box was nine inches on the appellants' side of the line.

The Lord Ordinary (Kyllachy) on the 21st of May, 1889, after a remit to, and report from, Mr. Carter, C.E., meantime interdicted the appellants "and all others acting with their authority from using the conduits, aqueducts, or opera manufacta, mentioned in Mr. Carter's report, or any of them, for the purpose of withdrawing water from the stream or streams mentioned in the note of suspension, and conducting the same into the tanks or reservoirs at the appellants' works, or from erecting or using any similar conduit or aqueduct or opus manufactum for the said purpose."

H. L. (Sc.)
1893
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In the Court of Session Lord Trayner (Lord Ordinary) allowed a proof, in which the respondents Watson & Shield proved that they had been unable during week-days to obtain a supply of water fit for use in their works, and had been compelled, after exhausting the supply stored on Sunday, either to close their works for the remainder of the week or risk damage to their yarns. The appellants attempted to prove that some of the stoppages at Messrs. Watson & Shield's occurred before the boxes were placed in the river. There was also evidence of engineers as to how the centre of the river should be ascertained in the circumstances. This latter question was not gone into at the Bar. On the 14th of November, 1889, Lord Trayner declared "the interdict previously granted perpetual"; and ordered the appellants to "forthwith remove the" tanks and other works complained of, and specified in the eight heads of the prayer of the note of suspension: and to restore the alveus, &c. His Lordship decided (1.) that the operations in the alveus were not illegal; (2.) that he came with difficulty and hesitation to the opinion that there was no trespass; and, deciding that the box was wholly on the appellants' side of the centre of the river, he held that McGavin had failed to establish either ground on which he had complained. Lord Trayner then found that but for the appellants' operations the whole Fithie would in its natural flow and at a point below the appellants' works mingle with the Dighty and thus reduce by dilution and oxygenation its impurity; but the appellants' operations had the effect of withdrawing water almost in its natural purity and returning it in a polluted condition; thus they destroyed or weakened the purifying influence of the Fithie water on the lower part of the stream. His Lordship then stated that interdict under the 5th head as asked for was refused, as the appellants were entitled to take the water of the Dighty as it passes their works for that purpose, although they were under obligation to restore it. And an interdict under the first part of head 8 was plainly what the complainers had no right to, looking to the use of the Dighty for more than forty years.

Costs were given to the complainers, but subject to some modification on account of the costs incurred relative to the question with McGavin on which the appellants were found to be right. But McGavin's claim was not dealt with separately in the interlocutor.

On the 30th of May, 1890, the Second Division pronounced an interlocutor "adhering" (1) to the Lord Ordinary's judgment: and on the 16th of October, an interlocutor awarding expenses to the complainers.

On appeal,

June 15. *The Lord Advocate* (*J. B. Balfour*, Q.C.), and *C. G. Guthrie* (of the Scotch Bar), for the appellants:—

The questions of trespass, legality of the erection in alveus, and the prescriptive right to pollute the Dighty, were all determined in the appellants' favour. As to the increase of pollution, the mill-owners on the Dighty have taken their opportunity to impound water, generally on Sundays and Saturdays, when the water is free from pollution, and it has not been shewn that the acts of the appellants in impounding the water of the Dighty or Fithie, and keeping it in for a time, have had any *material* effect in rendering the water lower down the river less pure. The alleged increase of pollution was not traced to the appellants. There was no analysis of the water, and the Lord Ordinary agreed that the pollution from chemicals had not increased.

[Lord Herschell, L.C.:—There are concurrent findings of the Courts against the appellants as regards pollution; and, in accordance with the view of the House in the *Owners of the P. Caland and Freight* v. *The Glamorgan Steamship Company* (2), the appellants must shew that these findings of fact were conclusively wrong.]

Secondly, the interdict is too wide. As to the respondent McGavin, the Lord Ordinary found against him, that he was not affected at all by the appellants' operations, and it appears to have been an error in the interlocutors that he was not excepted. Counsel for the appellants did not have an opportunity of seeing either of the interlocutors before they were signed; and, now, neither the Lord Ordinary, nor the Inner House, have power to alter their interlocutors. If McGavin was excepted out of the interdict the appellants might be able to deal with the other complainers. The interdict is also too wide in that it orders all the works to be removed, whereas they might be used for the perfectly innocent and legal operation of drawing water simply for cooling purposes; also, as it stands its wording might prevent the appellants exercising their undisputed right of taking water from what is really the Dighty.

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(1) 17 Court Sess. Cas. 4th Series (Rettie), 818.

(2) Ante, p. 207.

Henry Johnston (with him, *C. K. Mackenzie*), (both of the Scotch Bar), for the respondents, stated, in reply to questions of their Lordships, that the respondents did not dissent to the judgment of the House omitting the respondent McGavin, as McGavin only desired to preserve any interest which might be injured in the future; and, secondly, the respondents did not object to the wording of the interdict being altered as proposed (1). [They were not called upon to address the House further.]

Lord Herschell, L.C.:—

My Lords, this is an appeal from a judgment of the Court of Session affirming a judgment of the Lord Ordinary. The action is brought by certain persons, who are the owners of land bordering upon a stream called the Dighty, to obtain an interdict against the pursuers to prevent their abstracting water from a point where the Fithie flows into the Dighty, and taking it to their works by means of an aqueduct and then returning it into the Dighty in a polluted state, the result being, as the pursuers say, prejudicial to them.

Now, the appellants would, of course, have no right to take pure water from the stream and return it in a polluted state unless they could make out that by prescription, or in some other lawful manner, they had acquired that right. The works which were put down by the appellants two or three years ago were new works. They placed a box, on their side, I will assume, of the stream, but at the point at which the Fithie flowed into that stream from the north (the stream of the Dighty running west and east), so as to catch in this box as much as they could of the pure water of the Fithie, and take it by means of an aqueduct into their premises for their bleaching purposes. The water of the Fithie was preferable to the water of the Dighty for those purposes, inasmuch as the Dighty water always comes down more or less polluted, while the Fithie water is pure. There is no controversy about the object which they had in view, nor as to the works executed or their effect, though there has been controversy as to the proportion which the water abstracted bore to the total water of the Fithie, and as to the effect, upon the combined streams below their junction, of the operations of the appellants.

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(1) See the opinion of Lord Herschell, L.C.

Primâ facie what the defenders in the action, the appellants here, have done was a violation of the rights of the proprietors lower down the river. They took from the river at this point pure water and returned it in an impure condition. Apart from any prescriptive right which they may have to pollute the river, there would be an end of the case. But they say that they have acquired by prescription the right to send polluted water into the river; that they were in the habit of taking in water from the Dighty some distance higher up the river (I believe somewhere about three-quarters of a mile) at times when it was running pure, such as Sunday or Saturday afternoons, and filling their reservoirs with it for bleaching purposes, and that such water they had been in the habit, for a period giving them a prescriptive right, of taking and returning into the stream in a polluted condition; and their case is that although it is true that what they now do or seek to do had not been done by them before, yet the effect upon the lower proprietors is no greater than that which was produced by their doing what they had acquired a prescriptive right to do.

I will assume that this would be a sufficient answer to the pursuers' case if it could be established by evidence. But I desire emphatically to say that even assuming that, it appears to me that the onus of proving it rests with those who are seeking to justify the pollution, who are seeking to justify the act of abstracting water which was pure and sending it back in an impure condition. The question is, Have the defenders in the present case discharged themselves of that onus and established that the heritors lower down the river (I will deal with the case of Mr. McGavin presently) have no right to complain inasmuch as their condition now is precisely what it was before? My Lords, upon that we have a finding of fact by the Lord Ordinary and the Second Division of the Inner House the other way; and really that is the only question before your Lordships. Are you to reverse the concurrent findings, on a pure question of fact, of these two Courts, and give judgment the other way?

Now, the mode in which, upon a mere question of fact, the concurrent findings of two Courts ought to be dealt with has been more than once before your Lordships' House. In the case of *Owners of the P. Caland* v. *Glamorgan Steamship Company* (1), that matter was considered. In that case, I believe, all the members of your Lordships' House who took part in the judgment conceived an impression from the evidence different from that which had been arrived at by the two Courts below; so that if the matter had in the first instance come before those who were sitting as the Appellate Judges in your Lordships' House, their decision might probably have been the other way. Yet all the noble and learned Lords who were present on that occasion concurred in thinking that that was not enough to justify their reversing a concurrent finding, upon a mere question of fact, of the two Courts below, and that that could only be done where it could be demonstrated either that some cardinal fact had been overlooked, or that some altogether erroneous view had been taken of the bearing of the evidence upon the case—something, in short, which made the balance incline decisively and unequivocally in a direction opposite to that in which it had been found to incline by the Courts below. Now, my Lords, nothing of the sort can really be suggested here. A good deal of argument may be urged, and it must be admitted that there is a great deal to be said on both sides; but having heard all that was to be said, the two Courts below have concurred in the view to be taken of the facts; and I must say that, though I admit that there is much to be said on both sides, I do not see any sufficient reason for thinking that I myself should in the first instance have come to a different

(1) Ante, p. 207.

conclusion. But even if it were not so, I suggest to your Lordships that there are no grounds upon which this judgment could be reversed. There is nothing to shew that the learned Judges below have so distinctly erred as to justify your Lordships in saying that the concurrent finding of these two Courts ought not to stand.

That really disposes of the substance of the appeal. But it has been pointed out that as regards Mr. McGavin, who was not a heritor lower down, but whose land was immediately opposite the land of the defenders on the Fithie and at the junction of the Fithie and the Dighty, the case was a different one. He had not the same ground of complaint as the lower heritors had, and the Lord Ordinary in fact came to the conclusion that he had not established the case which was set up so far as he was concerned. The only ground upon which he gave judgment was one which did not include the case of Mr. McGavin, and he dealt with the question of expenses upon that basis. Probably by an oversight no distinction was made in the interlocutor between McGavin's case and the case of the other pursuers; and, again, in the Inner House the matter seems also to have been overlooked. Nevertheless, now that your Lordships' attention has been called to it, the learned counsel for the respondents assenting to that course being taken, which I certainly think was perfectly right on his part, I shall move your Lordships, whilst otherwise affirming the interlocutors, to reverse the interlocutor in so far as it relates to the respondent McGavin, and to dismiss the application in so far as insisted in by him, without prejudice to his right to bring any such action as he may think fit.

Attention has also been called to the fact that the interlocutor itself is somewhat wider than probably would have been the case if the matter had been brought to the notice of the Court. The interdict is against "using the conduits, aqueducts, or opera manufacta" "or any of them for the purpose of withdrawing water from the stream or streams mentioned in the note of suspension, and conducting the same into the tanks or reservoirs at the respondents' works." It has been pointed out that that is drawn wide enough to interdict the appellants from even taking water from the Dighty and bringing it into their works. Now obviously there was no such intention on the part of the Court. The purpose obviously was merely to deal with the water taken in at the junction of the two streams, which might be said to be either the Dighty or the Fithie or a combination of both. I therefore think that it would be proper to add a few words after the words "stream or streams," simply to carry out what is obviously the intention of the Court. In other respects, I move your Lordships that the interlocutors be affirmed.

LORD WATSON:—

My Lords, the appellants have for the prescriptive period taken a supply of water from the Dighty, as it passes their works, on Sunday and on Monday morning, at which times the water is comparatively pure, and have returned it to the river polluted. They now assert their right to take throughout the week, from a point about a quarter of a mile below their works, water entering the Dighty which had remained pure, notwithstanding their prescriptive pollution, and to return it to the river in a polluted state.

A prescriptive right to take, in a particular way and at a particular place, pure water which is returned to the stream in an impure state infers no right to take the supply of pure water in any other way and at any other place. I think the appellants had no right to make the alteration which they did upon the mode of supplying pure water to their works unless they were in a position to shew that the change could not by possibility affect the interest of heritors below. A proprietor who has prescribed a right to pollute cannot in my opinion use even his common law rights in such a way as to add to pollution.

If there had been no evidence as to the effect of the new arrangements made by the defenders in 1887 and 1888, I should have thought that they were of such a character as primâ facie to entitle the respondents to an interdict. But the Courts below have concurred in finding that the effect of the arrangement was to diminish the purifying effect of the water of the Fithie upon that of the Dighty below their junction, and thereby to increase its pollution.

The appellants have, in my opinion, failed to demonstrate that

that these findings are erroneous, and I therefore concur in the judgment proposed by the Lord Chancellor.

Lords Ashbourne, Macnaghten, and Morris concurred.

Lord Shand :—

My Lords, the complaint in this case by the respondents is that the appellants have unduly interfered with the waters of a stream admittedly pure, called the Fithie Burn. The appellants make no claim to any prescriptive right to pollute the water of the Fithie Burn, and it has been found by concurrent judgments of the Courts below, that by their operations pure water has been withdrawn from that burn and returned into the Dighty Burn in an impure and polluted state, with the result that the combined water of the Dighty and Fithie Burns passing the respondents' property has been polluted to a material degree beyond the condition of the water previous to these recent operations.

If this had been a case which had originated in the Sheriff Court, and there had been combined findings of fact, first by the sheriff-substitute or the sheriff in dealing with the case before him, and again by the Division of the Court in affirming that decision,—if there had been findings of fact combined and to the same effect,—then by statute (1) this House would have been excluded from reviewing those findings and the appellants would have been shut up to an appeal upon law only. There is no such statute applicable to cases which have originated in the Court of Session; but it is obvious that the same reasoning applies, and I think I may fairly say that if concurrent findings of the sheriff or the sheriff-substitute and the Court of Session are conclusive upon matters of fact, there seems to be even more reason for holding that the same concurrent findings in the Court of Session, of a judge in the Outer House and of judges in the Inner House, should have the same weight and effect.

Your Lordships have distinctly decided that this is so in the case to which the noble and learned Lord on the woolsack has already referred, and in an earlier case, which I believe was referred to by my noble and learned friend opposite (Lord Watson), namely, *Gray* v. *Turnbull* (1), which came from the Scotch Courts. In that case Lord Chelmsford says: "This, my Lords, is a question of fact on which there are the concurring decisions of two Courts and of no less than five judges, and therefore it seems to me to be absolutely essential, on principle, to hold the appellants' counsel to the necessity of not merely shewing that there may be some ground for doubt in the case, but to satisfy us convincingly and conclusively that the judgments complained of are entirely wrong."

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(1) Judicature Act of Scotland, 1825 (6 Geo. 4, c. 120), s. 40.

That being the state of matters, it is conceded in this case that if the verdict of the learned judges in the Court below (and there were five judges, just as there were five judges in the case referred to) be well-founded, the legal result cannot be disputed that the appellants must fail in this House. Now, have the appellants succeeded in this case, either in shewing convincingly and conclusively that the Court below came to a wrong conclusion upon the facts, or have they succeeded in shewing that there is any clear error in the judgment upon the facts, for some reason which can be very distinctly pointed out? I think there has been an entire failure to shew anything of the kind. This House has been invited to go into all the details of the evidence given before the Court below, to weigh that evidence, and to deal with it as if this were a Court of First Instance. But that falls a long way short of discharging the onus which lies upon the appellant in such circumstances as these.

As far as I can see, the Lord Ordinary and the Second Division of the Court have come to a sound conclusion upon the facts in this case; but even if I had very serious doubts upon that question, I think, looking at the authorities to which I have referred and to the reason on which these authorities proceed, this House should not be asked in such a case to review the decision upon a question of fact. Therefore I am of opinion with your Lordships that the judgment of the Court below should be affirmed.

Ordered that the said interlocutors of the Lords Ordinary, of the 21st of May and the 14th of

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(1) Law Rep. 2 H. L., Sc. 53.

H. L. (Sc.)
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November, 1889, *and also the said interlocutors of the Second Division of the* 30*th of May and the* 16*th of October*, 1890, *be, and the same are hereby reversed, in so far as they relate to the respondent Robert McGavin: Further Ordered, That the application, in so far as insisted in by him, be, and the same is hereby dismissed, without prejudice to his right to bring any such action as he may think fit: Further Ordered with respect to the remaining respondents, That the said interlocutor of the Lord Ordinary, of the* 21*st of May*, 1889, *be, and the same is hereby varied, by adding thereto after the words "stream or streams" the following words, "at or near their junction": Further Ordered, That the said interlocutor of the* 21*st of May*, 1889, *subject to this variation, also the said interlocutor of the Lord Ordinary of the* 14*th of November*, 1889, *and also the said interlocutors of the Second Division, of the* 30*th of May and the* 16*th of October*, 1890, *be, and the same are hereby affirmed: Further Ordered, That the said cause be remitted to the Court of Session in Scotland, to do therein as shall be just and consistent with this variation and this judgment: And it is further Ordered, That the appellants do pay to all the said respondents the costs incurred by them in respect of the said appeal to this House.*

Lords' Journals, 16th June, 1893.

Agents for appellants: *Loch & Co., for Henderson & Clark, W.S., Edinburgh.*

Agent for respondents: *Andrew Beveridge, for Mackenzie & Kermack, W.S., Edinburgh.*

[HOUSE OF LORDS.]

GILMOUR . . . . APPELLANT;

AND

NORTH BRITISH RAILWAY COMPANY RESPONDENTS.

H. L. (Sc.)
1893
June 23.

Railway—Statutory Agreement to stop all Ordinary Trains at Temporary Station—Subsequent Agreement to make Station Permanent—Right to have Trains stopped.

THIS appeal from a judgment of the First Division of the Court of Session, Scotland, recalling the decision of the Lord Ordinary, turned entirely upon the meaning of a section of the special Act of Parliament affecting the respondents' railway and a subsequent agreement, and involved no general principle of law whatever.

THE HOUSE (Lord Herschell, L.C., and Lords Watson, Ashbourne, Morris, and Shand) reversed the decision of the Court of Session (1), and allowed the appeal with costs, holding that all ordinary trains must stop at the station in question.

Interlocutor appealed from reversed, and interlocutor of the Lord Ordinary restored: Cause remitted: Respondents to pay to the appellant the costs in the Court of Session since the date of the Lord Ordinary's interlocutor, and the costs in this House.

Lords' Journals, 23rd June, 1893.

June 22, 23. *A. Graham Murray*, Q.C., and *C. N. Johnston* (both of the Scotch Bar), heard for the appellant.

The Lord Advocate (*J. B. Balfour*, Q.C.), and the *Solicitor-General for Scotland* (*Asher*, Q.C.), heard for the respondents.

Agents for the appellant: *Grahames, Currey, & Spens, for Macpherson & Mackay, W.S., Edinburgh,* and *Wilkie, Youden, & Bruce, Leven.*

Agents for the respondents: *Loch & Co., for James Watson, S.S.C., Edinburgh.*

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(1) 20 Court Sess. Cas. 4th Series (Rettie), 409.

[HOUSE OF LORDS.]

H. L. (Sc.)
1893
June 26.

J. R. THOMSON AND OTHERS (TRUSTEES) . APPELLANTS;

AND

CLYDESDALE BANK, LIMITED . . . RESPONDENTS.

Banker—Customer—Stockbroker paying into Credit of his own Account—Money of Client.

The appellants, who held as trustees fifty shares in the Commercial Bank of Scotland, instructed a stockbroker in Edinburgh to sell the shares and to deposit the proceeds in certain colonial banks in the names of the appellants. The shares were sold by the broker in the ordinary course of business, the dealing being between him and another member of the Stock Exchange who knew him only in the transaction, and accordingly gave in payment for the shares in the ordinary way a cheque payable to the broker or order. This cheque was paid by the broker to the credit of his account with the respondent bank. At the time when the cheque was paid in the broker's account with the respondent bank was overdrawn to an amount exceeding the amount so paid. The broker having become insolvent, the appellants claimed to be entitled to have the amount of the cheque repaid to them by the respondent bank. After the date of the receipt of the cheque some small amounts were drawn upon his account by the broker, but the amount so drawn was much less than the sum paid in. The respondent bank were aware that the cheque was the proceeds of the sale of shares, but did not know, and had made no inquiry, whether the money paid in was in the broker's hands as agent or otherwise:—

Held, affirming the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 751), that the respondent bank was entitled to retain the money in discharge pro tanto of the debt due to them from the broker.

APPEAL from a judgment of the Second Division of the Court of Session (1), which affirmed the interlocutor of the Lord Ordinary.

The action was raised at the instance of the appellants, Robert Thomson and others, trustees acting under the will of one Thomas Dunlop, against the respondents, the Clydesdale Bank, Limited, for payment of £2900, being the price of the sale of fifty shares of the Commercial Bank of Scotland, property of the Dunlop estate.

The appellants as trustees thought it desirable to sell these

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(1) 18 Court Sess. Cas. 4th Series (Rettie), 751.

H. L. (Sc.)
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Thomson
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Bank,
Limited.

shares. Their agent instructed D. B. Thomson, stockbroker, Edinburgh, to sell them and deposit the proceeds in certain colonial banks in the names of the appellants. D. B. Thomson duly sold the shares and received from the buying broker a cheque to his order on the Commercial Bank for £2921 10*s.* 6*d.*, being the price thereof, amount of stamp, and fees. This cheque D. B. Thomson paid in to his credit with the respondents on the 19th of March, 1890, the day on which he received it, £2000 being put to the credit of his Edinburgh account and £900 to his London. At the same time D. B. Thomson represented to the appellants' agent that in consequence of certain informalties in signing the transfers he had not received the price. On the 24th of March, 1890, D. B. Thomson absconded. It was then found that he was insolvent, that he had made no investment for the appellants, and that his account with the bank had been largely overdrawn.

The appellants claimed the proceeds of the cheque as representing the price of the shares. The respondents, on the other hand, maintained that the cheque was received by them in the ordinary course of business and the proceeds placed to D. B. Thomson's credit when he was indebted to them in a sum greatly exceeding that amount.

It appeared that D. B. Thomson's account with the respondents was opened on the 2nd of January, 1889, by a payment of £100 to his credit. That he had about that time commenced business as a stockbroker in Edinburgh. That D. B. Thomson's father, who was one of the respondents' bank agents in Edinburgh, arranged with the agent of the bank where D. B. Thomson's account was kept that D. B. Thomson should have an overdraft to the extent of £600, and his father deposited securities to that amount.

On the 9th of December, 1889, the respondents' Glasgow office wrote to the Edinburgh office, observing that D. B. Thomson had occasional overdrafts for large amounts apparently unsecured, "such as the 30 ult., when against his debit balance of £4617, you appear to have held only the guarantee of £600, and we would like to know if you are quite satisfied of the safety of these advances which seem to us much too large." The

Edinburgh bank wrote back that D. B. Thomson explained that his overdraft arose from his having sold on instructions certain stocks, the proceeds of which were to be placed against stocks purchased, and that the purchased stocks came in signed by the seller, and had to be paid for, while the transfer of the stocks sold had to be sent to different parts of the kingdom. From the beginning of 1890 D. B. Thomson's account shewed continuously a debit balance.

On the 14th of February, there was a credit balance of £833; but by the end of the next day a debit balance of £1193. This being the case, D. B. Thomson prevailed on his father to give the bank a further guarantee. Accordingly the father wrote on the 24th of February, 1890: "Owing to the serious illness of the sole trustee of an estate, who had sold fifty-eight shares of the Commercial Bank of Scotland through my son, and the re-investment of the proceeds of the same having been effected, I will thank you to allow an overdraft upon D. B. Thomson's account to the extent of £3500, and I undertake to see the same repaid to you. This I expect will be shortly, as the other parties interested are taking steps to go upon the bank's register." This letter, though untrue and incorrect in several particulars, really related to the sale of the appellants' shares, though this was not known to the respondents or D. B. Thomson's father.

D. B. Thomson's Edinburgh account shewed on the 18th of March, 1890, a debit balance of £4870, increased on the 19th of March by another cheque for £1400 to a total debit balance of £6270. On the 19th of March the respondents received the price of the appellants' shares, £2000 being placed to D. B. Thomson's credit at the respondents' Edinburgh branch, and £900 to his credit at the respondents' London branch which was also overdrawn. The only sums which were paid by the respondents to or on account of D. B. Thomson after the receipt of the £2900 were £55, £106 15*s*., and, in London, £563. When D. B. Thomson's whole accounts were adjusted and credited with the £2900, and the sums of £600 and £3500 paid by the father, the respondents were still due by D. B. Thomson £796, which they placed to profit and loss account.

It appeared from the evidence that the respondents' managers in Edinburgh made no inquiry as to whether the money paid in was in D. B. Thomson's hands as stockbroker or otherwise. That they had no knowledge except that it was the proceeds of the sale of shares. That the father had orally requested them to help his son at a settlement time when required; that during 1889 large sums were frequently paid in and drawn out of D. B. Thomson's account: which during the earlier portion of that year was fairly balanced; And that in the bank books D. B. Thomson was described as a stockbroker.

The Lord Ordinary (Kyllachy) assoilzied the respondents from the conclusions of the action on the 3rd of July, 1890; and the Second Division of the Court of Session affirmed (1), his interlocutor (Lord Young dissenting) on the 19th of March, 1891.

On appeal,

June 23. *The Lord Advocate* (*J. B. Balfour*, Q.C.), and Finlay, Q.C., for the appellants:—

The proper inference from the facts is that the respondents knew that the money in question was in all probability not the property of the broker, and that he had only the custody of it. This being the case, they cannot retain such money as against the real owner. As soon as a banker has notice that an account is a trust account he cannot retain the balance against the real owner, no further substantial credit having been given upon such balance.

[LORD HERSCHELL, L.C.:—This House held, in *London Joint Stock Bank* v. *Simmons* (2), that it was not enough that there was reason to believe that the security was another's property; there must also be a belief that the borrower was acting fraudulently.]

Ex parte Cooke (1876) (3) decided that the position of client and broker was not merely that of creditor and debtor, but that the broker occupies a fiduciary position. And although in *In re Hallett's Estate* (1879) (4) other points were mentioned, Jessel, M.R., said that the modern doctrine of equity as regards property disposed of by persons in a fiduciary position was clear, that the owner can follow the produce of the sale. These cases establish that a stockbroker acts in the character of a trustee. The respondents knew that Thomson was a stockbroker with a fiduciary character. It follows that as soon as they know the money is claimed as trust money they must surrender it. *Earl of Sheffield* v. *London Joint Stock Bank* (1888) (1), though depending on peculiar facts, shews in what cases knowledge of a trust ought to be inferred. It is not to be presumed that a person has authority to pay his own debt with the money of another. It may be reasonable that a stockbroker's account should be occasionally overdrawn, but it is inconsistent with sound business that such an account should be continuously overdrawn. If that is the case, it is evident the stockbroker must be speculating on his own account, and the bankers who allow such unsound business to go on must run the risk of it. *Wardlaw* v. *Mackenzie* (1859) (2), cited in the Court of Session, hardly applies.

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(1) 18 Court Sess. Cas. 4th Series (Rettie), 751.

(2) [1892] A. C. 201.

(3) 4 Ch. D. 123.

(4) 13 Ch. D. 696.

Sir *Horace Davey*, Q.C., and *Ure* (of the Scotch Bar), for the respondents, not called upon.

LORD HERSCHELL, L.C.:—

My Lords, the appellants in this case are the trustees of the late Thomas Dunlop. They held fifty shares in the Commercial Bank of Scotland, which they resolved to sell with a view to another investment. They accordingly, in February, 1890, instructed Mr. D. B. Thomson, a stockbroker in Edinburgh, to sell the shares and to deposit the proceeds in certain colonial banks in the names of the appellants. The shares were sold by Mr. Thomson, and the sum realized was paid in by him to his account with the respondent bank. The transaction was carried out in the ordinary way by Mr. Thomson, the dealing being between him and another member of the stock exchange who knew him only in the transaction, and accordingly gave in payment for the shares a cheque payable to Mr. Thomson or order. This cheque was paid in by Mr. Thomson to the

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(1) 13 App. Cas. 333. (2) 21 Court Sess. Cas. 2nd Series (Dunlop), 940.

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Clydesdale Bank. At the time when the cheque was paid in, Mr. Thomson's account with the Clydesdale Bank was overdrawn to an amount exceeding the amount so paid. Some few days afterwards Mr. Thomson absconded, and application was then, or shortly afterwards, made by the appellants for the payment to them by the Clydesdale Bank of the sum of money which they had so received from Mr. Thomson. After the date of the receipt of that cheque some small amounts were drawn upon his account by Mr. Thomson, but the amount so drawn was greatly less than the sum paid to his account in the manner which I have described to your Lordships. The question is whether under these circumstances the appellants are entitled to follow, as it is called, this sum of money and to require its payment to them by the Clydesdale Bank, or whether the Clydesdale Bank are entitled to retain it in discharge pro tanto of the debt which was due from Mr. Thomson.

It cannot, I think, be questioned that under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him. But it is said that in the present case the bankers took with notice that the sum which they received was a sum of money not belonging to their debtor personally, but which he held or had received for other persons, and that, having had this knowledge or notice, they are not entitled to retain it in discharge of Mr. Thomson's debt. My Lords, I cannot assent to the proposition that even if a person receiving money knows that such money has been received by the person paying it to him on account of other persons, that of itself is sufficient to prevent the payment being a good payment and properly discharging the debt due to the person who receives the money. No doubt if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon ordinary principles which I need not dwell upon. But in the present case there appears to me to be an absolute absence of any evidence of that kind. Reliance is entirely placed, on behalf of the appellants, upon the answers given by the manager of the bank, which were in these terms: "I made no inquiry as to whether the money paid in to Mr. Thomson's account was in his hands as broker or otherwise. I believed that it was in his hands as broker acting for clients. (*Q.*) And that, I suppose, would be your belief generally when he made payments into his account of a large amount? (*A.*) Yes. (*Q.*) Did you know whether or not Mr. Thomson was engaged in a speculative account of his own? (*A.*) I had not the least knowledge. (*Q.*) For anything you knew, the cheques may have been paid in for dealings in which he was principal? (*A.*) We believed that the cheques were just paid in in the ordinary course of business. (*Q.*) As money belonging to him or at his disposal? (*A.*) Yes."

Now, that is the whole of the evidence upon which reliance is placed; and it seems to me that, so far from proving the case sought to be set up on behalf of the appellants, it really proves the contrary.

The only point to which I have not alluded, and upon which stress was laid, is this: that in the bank books Mr. Thomson is described as a stockbroker; therefore, it was said, his account would be understood to be one relating to matters in which he was acting for principals, and that this, coupled with the answers to which I have alluded, is sufficient to establish the appellants' case. My Lords, if a stockbroker who was receiving money in respect of transactions for his clients could never properly pay it to his account in discharge of liabilities incurred, there might be something in the case of the appellants; but obviously that is not so. A stockbroker may make advances to his clients in anticipation of sums which he will receive for them. In that case it is perfectly legitimate, he having obtained for that purpose an advance from his bankers, that when he receives the money for his clients he should pay it to his bankers for the purpose of reinstating the account he has overdrawn. Therefore it is clear that there may well be cases in which a stockbroker having overdrawn his account may properly pay money which he has received for his clients into that account. It is obvious that the case of the appellants wholly fails unless they bring home to the respondents much more than has been attempted here, namely, a knowledge that in the particular case the person was not justified in paying over the particular amount. Of course, if they prove that there was such knowledge on the part of the bankers, the bankers could not retain it. It seems to me that if, because an account is opened with bankers by a stockbroker, they are bound to inquire into the source from which he receives any money which he pays in, it would be wholly impossible that business could be carried on, and I know of no principle or authority which establishes such a proposition. I confess therefore, with all respect for the learned judge who took a different view in the Court below, that it seems to me to be a very clear case.

For these reasons, I move your Lordships that the appeal be dismissed with costs.

LORD WATSON:—

My Lords, I am of the same opinion with the Lord Chancellor, and for the same reasons.

When a broker, or other agent entrusted with the possession and apparent ownership of money, pays it away in the ordinary course of his business, for onerous consideration, I regard it as settled law that a transaction which is fraudulent as between the agent and his employer will bind the latter, unless he can shew that the recipient of the money did not transact in good faith with his agent.

In this case a broker employed by the appellants to sell stock and invest the proceeds sold and received payment of the price by a cheque of the purchasing broker payable to himself. He then passed the cheque to the credit of his current account with the respondent bank, which at the time was largely overdrawn. The course thus followed was an usual one, and in strict accordance with the practice of the Edinburgh Stock Exchange. The payment to the bank was onerous in so far as concerned the

Lord Watson.

respondents, because, whenever made, it operated in law as a discharge by them pro tanto of the broker's liability for the debit balance on his account; and several drafts were made by him and honoured before his dishonesty became known.

The broker knew that he was insolvent, and that he was using his customers' money to pay his own debt to the bank without any reasonable expectation of his being able to replace it. That was an undoubted fraud upon the appellants; but, in my opinion, the broker's fraud is of no relevancy in this case, unless it is coupled with bad faith on the part of the respondents. The onus of proving that they acted in malâ fide rests with the appellants. It is not enough for them to prove that the respondents acted negligently; in order to succeed, they must establish that the respondents knew, not only that the money represented by the cheque did not belong to the broker, but that he had no authority from the true owner to pay it into his bank account.

The appellants have, in my opinion, failed to prove either of these cardinal facts. I do not think it necessary to examine the evidence, and shall content myself with a reference to the note of the Lord Ordinary, which deals with the facts of the case, and the law applicable to them, to my entire satisfaction.

LORD MORRIS:—

My Lords, I concur.

LORD SHAND:—

I am of the same opinion. It seems to be clear that the broker employed by the appellants acted not only in violation of his duty and obligation as their agent, but also fraudulently. He had special instructions from the appellants to invest the price to be received for the bank shares sold; but, in place of doing so, he paid the amount received to the respondents in the reduction of the balance then due by him to them on his account. Such a payment might have been made in the hope and with the intention of afterwards drawing the amount for the purpose of investing it as directed. The broker's conduct, and the pecuniary circumstances in which he was placed, lead, however, to the inference that he had no such hope or intention, but seem to support the conclusion that he fraudulently applied the money to the payment of his own debt, in order to gain time to make arrangements for absconding, as he did a few days afterwards.

But the breach of obligation or fraud of the broker alone cannot entitle the appellants to recover from the respondents the amount of the payment made to them. The appellants entrusted the broker with the money to be employed as they had directed. It is proved, and it is indeed well known, that a broker, according to the ordinary practice, receives as payment of the price of shares sold the cheque of the buying broker, and in the first instance places the amount to the credit of his own bank account. Thereafter he gives a cheque on his own bank account to his employers for the amount received, less his charges; or he gives his cheques to others if, as in this case, he has directions to make reinvestments. In this way the broker has the possession of the money, and the power of disposal which possession gives, and it is in accordance with the usual practice that the money should be mixed with, and form part of, his general funds. He has thus the opportunity, and may take advantage of this, to misapply and to appropriate to his own use the money entrusted to him by a customer; and the principal's only remedy lies against his agent, whom he has so trusted.

Where questions arise with third parties into whose hands the money can be traced, as in this instance, liability against them for recovery of the sum misapplied arises only where it can be shewn directly, or as the reasonable inference from facts proved, that these parties were cognizant that the money was being wrongfully used, in violation of the agent's duty and obligation.

Accordingly it was not maintained in the argument in the present case that, if the agent had employed the money in question, or a large part of it, in the payment of debts due by him to the different tradesmen with whom he might have dealt, in ignorance on their part of any violation of his obligation to employ the funds otherwise, the appellants would have had any claim excepting against the agent himself. Indeed, although a different view was at first maintained, it seemed to be conceded before the close of the argument that the same principle must apply to the ordinary case of bankers with whom stockbrokers deal, and with whom they keep their bank accounts; and the argument for the appellants was rested entirely on the special circumstances said to exist in this case.

However this may be, I am of opinion that the same principle which applies to third parties generally is equally applicable to the case of dealings between stockbrokers and their bankers, and that the only circumstances in which money misapplied by a broker in payment to the banker of a debt due to him can be recovered from the banker by the principal to whom the money belonged, is where it can be shewn directly, or by inference from the facts proved, that the banker or his representative in the transaction knew that the money was being misapplied. It has been shewn in the present case, and indeed is notorious, that a stockbroker is often in advance for his customers, and that on settlement days and at other times he may require temporary advances, which will in due course be repaid shortly afterwards, when the broker receives payment of the prices of stocks sold and delivered by him. Accordingly the knowledge of the banker that money paid in by which a broker reduces or extinguishes an overdraft on his account consists of the prices received for customers' stocks delivered, or of the price of stock belonging to a particular customer, is nothing more than knowledge of what is constantly occurring in the ordinary course of business. The broker may or may not owe the price to his principal. In the general case he does, but in others he may have already advanced the amount; or his principal and he may have had other stock transactions which leave a balance in the broker's favour; or the arrangement between the parties may be that the broker is to retain the fund for an interval of more or less time for the purpose of reinvestment or otherwise. It would be impossible that such business could be carried on if it were held to be obligatory on a banker, in order to save himself from the consequences of a possible breach of duty or obligation, or of the fraud of an agent to his principal, that the banker should examine into the particulars of the various transactions resulting in the payments by brokers or agents to the credit of their accounts, on each occasion on which such payments are made; and that the only rule that can be applied in practice, and which, as I think, rests on sound principle, is that liability for repayment of funds which can be traced or followed into the banker's hands, and which has been applied in payment of the agent's debt, shall arise only where it can be shewn that there was knowledge, on the banker's part, not merely that the fund was received from the broker's principal, but knowledge also that the payment was a misapplication of the fund, made in violation of the agent's duty and obligation.

With regard to the specialties which are founded on in this case, as distinguishing it from the general case, it appears to me, after full consideration of the argument of the appellants, that the case fails. The only specialty, I think, that was latterly founded on was that the overdrawn account was said to have got into what is called a "chronic condition"—that is to say, that for a considerable length of time the balance had been steadily against the broker. I do not know that, however much that might be so, it would make any difference in the result of the case; but, on looking over the broker's account, which we have before us for fifteen months from the 2nd of January, 1889, I find that, consisting as it does of about twelve pages of closely-printed matter, there is a constant and fluctuating balance throughout almost the whole period. At one time the balance was a good deal against the broker, at other times it was somewhat in his favour; but so recently as the 15th of March, the transaction in question having occurred on the 19th of March, I find that the total amount to the broker's debit was the sum of £1285. I can see nothing suspicious in the state of the broker's account, and nothing to indicate to the bankers that any funds to be now paid in to wipe out the balance, in whole or in part, was being obtained by any violation of duty or fraud; and I agree with the Lord Chancellor in thinking that there is no evidence whatever here of facts which put the bankers on inquiry, or which can be founded on as shewing that they must have believed or known that this was a misapplication of funds.

A number of authorities were referred to in the case. The only one which has not been dealt with in the Court below, I think, is the case of the *London Joint Stock Bank* v. *Simmons* (1).

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(1) [1892] A. C. 201.

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That case related to negotiable securities, while the present relates to money, entrusted to the broker. The decision and dicta of your Lordships in that case are both strongly adverse to the appellants' claim. As to the other authorities, and as to the facts of the case, I agree with my noble and learned friend opposite (Lord Watson) in thinking that they are most satisfactorily dealt with in the short and able judgment of Lord Kyllachy.

Interlocutors appealed from affirmed, and the appeal dismissed with costs.

Lords' Journals, 26th June, 1893.

Agents for appellants: *Gadsden & Treherne, for Mackenzie & Black, W.S., Edinburgh.*

Agents for respondents: *Murray, Hutchins, Stirling, & Murray, Solicitors, for Morton, Smart, & Macdonald, W.S., Edinburgh.*

[PRIVY COUNCIL.]

MOUBRAY ROWAN AND HICKS . . . DEFENDANTS;

AND

DREW . . . . PLAINTIFF.

J. C.*
1893
Feb. 8;
March 4.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Melbourne Corporation Act (14 *Vict. No.* 20)—*Lane on private land—Rights of adjoining Owners and Occupiers.*

Held, that when a lane set out on private land has been brought under the provisions of the Melbourne Corporation Act (14 Vict. No. 20), the Act does not confer on the adjoining owners and occupiers such a right of passage over it as precludes the owner in fee from ever resuming the control or exclusive possession of such lane.

APPEAL from an order of the Supreme Court (July 18, 1890), amended by an order (Sept. 4, 1890), so far as it reversed the judgment at the trial of the action.

The facts and proceedings are stated in the judgment of their Lordships.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the appellants.

Sir *Horace Davey*, Q.C., *Muir Mackenzie*, and *F. Fitzgerald*, for the respondent.

The English cases cited as being in pari materiâ were *Midland Railway Company* v. *Watton* (1); *Reg.* v. *Newport Local Board of Health* (2); *Wakefield Local Board* v. *Lee* (3); *Taylor* v. *Corporation of Oldham* (4).

The judgment of their Lordships was delivered by

1893
March 4.

LORD MACNAGHTEN :—

The appellants who were defendants in the action were lessees and occupiers of large business premises in the city of Melbourne,

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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(1) 17 Q. B. D. 30.
(2) 3 B. & S. 341.
(3) 1 Ex. D. 336.
(4) 4 Ch. D. 395.

situated on the south side of Little Collins Street which runs east and west. Along the eastern boundary of the defendants' premises there is a lane about 10 feet in width and about 164 feet in length opening into Little Collins Street on the north, and closed at the south end, thus forming a cul de sac. Over this lane the defendants under their lease had a right of way, and it was used by them as a means of access to their buildings in the rear. The premises leased to the defendants and the ground on which the lane was formed are part of Crown Allotment No. 5 of sect. 13.

The plaintiff who is now respondent was the occupier of a shop and restaurant in Little Collins Street bounded on the west by the lane already described. His premises are part of Crown Allotment No. 6 of sect. 13.

Allotments Nos. 5 and 6 were granted by the Crown on the same day to different persons without any reservation of rights as between the grantees.

In his statement of claim the plaintiff alleged three causes of action against the defendants, (1.) obstruction to the lane as a public way, (2.) trespass by fixing boards to his premises, and (3.) interference with the access of light and air through certain windows in his premises which looked into the lane.

The case was tried before Mr. Justice Holroyd without a jury. The evidence was somewhat conflicting. But the learned judge found (1.) that the lane had not been dedicated to the public, (2.) that no trespass had been committed by the defendants, and (3.) that the plaintiff was not entitled to the access of light and air which he claimed. Judgment was accordingly given for the defendants but without costs.

From this judgment the plaintiff appealed. The learned judges of the full Court did not differ from the primary judge as to any of the findings of fact on which his decision was based. But on the appeal an argument was raised for the first time as to the effect of the Melbourne Corporation Act, 1850 (14 Vict. No. 20) under which as appeared in the evidence at the trial the lane in question had been brought. The full Court acceded to this argument and directed that judgment should be entered for the plaintiff for one shilling damages for the obstruction of the way.

J. C.
1893
MOUBRAY
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DREW.

In the opinion of the full Court which was delivered by the late Chief Justice Higinbotham the Act of 1850 is discussed at length. The conclusion at which the Court arrived and on which their judgment rests is stated in the following passage:—

"We entertain no doubt that when a lane set out on private land has once been made under the provisions of this Act, the adjoining owners and occupiers and all persons claiming through or under them acquire under and by virtue of the Act a right of passage over such lane, and that the owner in fee can never resume the control or exclusive possession of his property so as to deprive any of such persons of that right."

The question therefore which their Lordships have to decide is whether the Act of 1850 does interfere with private rights in the manner and to the extent supposed by the judgment under appeal. The question is obviously one of great importance to the community as well as to the owners of private property in the city of Melbourne. If the judgment is right the owner of a block of land with a private way upon it once brought under the operation of the Act would find it extremely difficult on any future occasion to improve his property by laying it out on a different plan.

The Act of 1850 is intituled "An Act for regulating the formation, drainage and repair of streets courts and alleys on private property within the City of Melbourne." It recites that "there now are and hereafter may be streets courts and alleys" within the city boundaries "formed or set out on private property . . . which are not or may not be sufficiently paved . . . drained or otherwise completed or repaired" and that it would conduce to the convenience comfort and health of the inhabitants . . . and to the public advantage if provision were made to regulate and enforce the paving . . . draining and sewering or otherwise completing or repairing such streets courts and alleys in manner hereinafter mentioned." It then enacts (s. 1) that all streets courts and alleys on private property within the city shall be under and subject to the rules and directions thereinafter contained, but it is provided that nothing in the Act shall apply to any such street court or alley unless "the owners or occupiers of two or more tenements adjoining or abutting thereupon have the right to use or do commonly use the same."

The words "tenements adjoining or abutting on such street court or alley" are defined in sect. 11 to mean "tenements or premises the owners or occupiers of which communicate with or have the right to use or commonly use any such street court or alley or part thereof." That definition was afterwards amended by 27 Vict. No. 178, sect. 65, which enacts that the words in question where used in the Act of 1850 shall be deemed and taken to mean "all tenements or premises actually abutting upon and accessible from and communicating with such street court or alley whether the owners or occupiers thereof have or have not a right to use or do commonly use the same."

Sect. 2 of the Act of 1850 provides that the council of the city may order that any such street court or alley or any part thereof which in their opinion is not in a proper state "shall be freed from obstruction paved . . . drained and sewered or otherwise completed or repaired in such manner and within such time as to the said council may appear expedient"; and thereupon the owners of the tenements adjoining or abutting upon such street court or alley on each side thereof are required to comply with the order as regards "so much of the said street court or alley to the centre thereof as may be opposite to and co-extensive with their respective tenements adjoining or abutting on such streets courts or alleys respectively."

The Act then contains provisions enabling the council in case of default on the part of the owners to do the necessary works themselves and to recover the expenses from the owners by action of debt and by a warrant of distress to be issued by any justice of the peace for the city of Melbourne or to recover the amount from the occupiers to the extent of any rent then due or thereafter to become due from them and in that case the amount was to be deducted from the rent.

Sect. 8 provides that every order of the council is to be published twice in two successive weeks in the Government *Gazette* and in one or more of the Melbourne newspapers, and that such order shall not "begin to take effect until the end of one calendar month next after the last publication thereof in such gazette or newspaper"; and it declares that such order, and the publication thereof as aforesaid, is to be deemed sufficient and valid notice to all owners, occupiers, and others interested in the said premises.

Sect. 9 enacts that any person obstructing or making any alteration in the pavement or carriage-way or footway of any such street court or alley without the consent in writing of the council or their surveyor, may upon conviction before the justices of the peace be ordered to pay for every such offence any sum not exceeding £5, to be recovered as mentioned in the Act, subject to a proviso that the governor of the colony for the time being may pardon any offender, and remit the whole or any part of the penalty, as the justice of each particular case may seem to require.

There is nothing else in the Act bearing on the question involved in this appeal.

Commenting on the main provisions of the Act, the learned judges of the full Court make the following remarks:—

"These provisions of the Act, while they impose upon adjoining occupiers as well as owners certain obligations, confer in our opinion by necessary implication a statutory right of user of a lane upon all persons who are or may be required to contribute to the expense of forming it, and upon their successors in title or occupancy. It cannot be supposed to have been the intention of the legislature that a class of persons should be liable to be compelled to contribute in the first instance or absolutely to the making, and from time to time to the repairing, of a lane which they were not to have the right to use for passage to and from their houses. The fact that one or more of the owners and occupiers had not paid their proportions cannot in our opinion affect this question."

Their Lordships are unable to accept the view of the full Court. It is to be observed that the Act does not, at least in terms, confer or purport to confer any rights whatever upon persons who may be called upon to contribute to the improvement of a private street without having at the time any legal right to use it; nor does the Act interfere or purport to interfere with the rights of owners of private streets, except so far as may be required to carry out the purposes stated in the preamble. It is quite true that, when a street has been improved in pursuance of an order made under the Act, no obstruction or alteration is permitted without the consent in writing of the council or their surveyor. Some provision of that sort there must be, or the Act would be futile. But it is not to be supposed that a public body like the council of the city of Melbourne would use its powers arbitrarily to the prejudice of private rights of property; nor is it to be assumed that such an abuse, if it should be committed, would be without remedy. It may or may not be unreasonable to compel a person, whose property adjoins a private street which he has no right to use, to contribute to its improvement so long as he has no communication with it. Legislation to that effect, whatever may be thought of the justice of the case as an abstract question, is not without precedent in this country. But it does not seem very unreasonable to require contribution from an adjoining owner who chooses to keep up a communication between his property and a private street over which he has no right of way. If he has any grievance, he has no one to thank but himself. He must have at least a month's notice of an order under the Act before it can "begin to take effect." In the meantime, if he likes, he can close up all means of access and cut off all communication. In that case, apparently, there would be no liability upon him. If he prefers to count upon the goodwill or indifference of his neighbour, why should he not be taxed for the improvement of property which he is actually enjoying at the time, though his enjoyment may be precarious? If it be hard upon him to make him contribute to an improvement, the benefit of which he will not enjoy as of right, surely it is some hardship upon the owner of the property on which the street has been formed to compel him to share his rights with a person who pays him nothing for the privilege, and who may by good luck escape payment altogether. The construction which the full Court has adopted involves, as their Lordships have already intimated, a serious invasion of private rights, and one which may be prejudicial to the public by preventing improvements desirable in the interests of the community as well as in the interests of the proprietor.

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v.
DREW.

Besides arguing this question, the learned counsel for the respondent endeavoured to maintain the judgment under appeal by contending that both Mr. Justice Holroyd and the full Court were in error in holding that the lane in question had not been dedicated to the public. There is no absolute rule to the effect that two concurrent judgments on a question of fact are not to be disturbed. But this board would certainly be very slow to differ on a finding of fact from a judge of first instance who has had the advantage of seeing the witnesses when his judgment has been affirmed by the Court of Appeal. In the present case their Lordships, having heard the judge's notes of the evidence read and discussed, agree with the full Court in thinking that there is no reason to suppose that the primary judge came to a wrong conclusion on any of the issues of fact.

In the result, therefore, their Lordships will humbly advise Her Majesty that the appeal ought to be allowed, and the judgment of Mr. Justice Holroyd restored. The respondent will pay the costs of the appeal to the full Court and of this appeal.

Solicitors for appellants: *Want & Co.*
Solicitors for respondent: *Keen, Rogers & Co.*

[PRIVY COUNCIL.]

SMART & CO. . . . . DEFENDANTS;

AND

TOWN BOARD OF SUVA. . . . . . . PLAINTIFFS.

J. C.*
1893
March 15;
April 28.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

Law of Fiji—Boundaries of Town—Construction of Proclamation—High-water mark on the Seashore.

Where by proclamation the limits of a town, and therefore of rateable property within a town, were fixed, the western boundary to be the sea-coast at high-water mark, the eastern boundary to be at a specified distance therefrom, the northern and southern boundaries to connect the eastern by lines of specified length with certain points on the high-water mark, and it appeared that the appellants had been rated in respect of lands reclaimed by them beyond the western boundary or high-water mark, as it existed at the date of the proclamation, but within that mark as it existed when the rates were imposed:—

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* *Present:*—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

Held, that the appellants were liable. The true construction was that the eastern boundary was absolutely, and the northern and southern sufficiently fixed in reference to the high-water mark as it existed when proclaimed, but that the western boundary varied from time to time with the high-water mark as it shifted.

APPEAL from a judgment of the Supreme Court (May 11, 1891) in review, reversing a judgment of the same Court in its summary jurisdiction.

The facts are stated in the judgment of their Lordships.

Bompas, Q.C., and *H. B. Bompas*, for the appellants, contended that the words "along high-water mark" in the proclamation of 1886 meant the then existing high-water mark, and not the high-water mark for the time being. Unless that boundary was fixed the other boundaries of the town shifted with it, and the whole area was uncertain. The land of the appellants was outside the boundary as fixed by the proclamation, and therefore rates could not be assessed upon it by the respondents. The following cases shew that reclamations are not within a parish, and otherwise illustrate the interpretation of this proclamation: *Bridgwater Trustees* v. *Overseers of Bootle-cum-Linacre* (1); *Aërated Bread Company* v. *Gregg* (2); *Reg.* v. *Wood* (3); *Collier* v. *Worth* (4); *Ipswich Dock Commissioners* v. *Overseers of St. Peter Ipswich* (5); *Middleton* v. *Andrews* (6).

The respondents did not appear.

1893
April 28.

The judgment of their Lordships was delivered by

THE HON. GEORGE DENMAN:—

This was an appeal against a decision of the Supreme Court of Fiji, pronounced by the Chief Justice, which reversed a judgment in favour of the present appellants in an action in

(1) Law Rep. 2 Q. B. 4.
(2) Law Rep. 8 Q. B. 355.
(3) Law Rep. 4 Q. B. 559.
(4) 1 Ex. D. 464.
(5) 7 B. & S. 310.
(6) 21 Ir. L. Rep. 411.

which the respondents sued for £12 10s., the amount of rates assessed in respect of lands recently reclaimed by the appellants on what had previously been foreshore on the seaward side of the town of Suva.

The respondents were not represented before their Lordships, but the case was fully argued on behalf of the appellants.

The case for the appellants states that "the only question in this appeal is, whether the land on which the rates have been imposed is within the boundaries of the town of Suva"; and, looking at the reasons given at the end of the appellants' case, their Lordships can entertain no doubt that the only ground upon which this appeal can be supported is, if the appellants can establish that the Chief Justice was wrong in holding that the lands in question, being within high-water mark as it now exists, are rateable, notwithstanding that they are outside of the high-water line as it existed in 1886.

In order to understand the point raised it is necessary to refer to a few documents only.

By an Ordinance of the 13th of April, 1877, enacted by the Governor of the Colony of Fiji, with the advice and consent of the Legislative Council, called the "Towns Ordinance, 1877," it was enacted in sect. 2 that "It shall be lawful for the Governor by proclamation under his hand and the seal of the Colony to constitute a town in any suitable locality, and by such proclamation to define the limits and boundary of such town."

By a proclamation dated the 2nd of July, 1881, the town of Suva was proclaimed to be a town within the meaning of the above-mentioned Ordinance, and the limits and boundaries were thereby defined. It is unnecessary to set out all these boundaries. It is sufficient to mention that they were altered by a subsequent proclamation, and that the one to seaward was described as "from a point on the sea-coast, by the sea," to the point of commencement which was at a point "on the sea-coast," without any allusion to high or low-water mark.

By an Ordinance of the 21st of August, 1884, it was enacted that the Governor might, in accordance with any resolution from time to time passed by the Legislative Council, by proclamation extend or alter the limits and boundaries of any town constituted or to be constituted, and by such proclamation define such extended or altered limits and boundaries, and that the town specified in any such proclamation should within the limits and boundaries so proclaimed and defined, be deemed to have been proclaimed within the meaning and for the purposes of Ordinance No. 16 of 1883.

This last-mentioned Ordinance was, so far as Suva was concerned, a mere re-enactment of the Ordinance of 1877.

By an Ordinance of 1885, which is to be read and construed together with that of 1883, and the two to be cited as "The Towns Ordinance, 1883–1885," the power to bring an action for rates is given.

On the 26th of November, 1886, a new proclamation was made which is still in force, and the effect of which is in question in this case.

By this proclamation, after reciting the Ordinance of 1884, it is proclaimed that from the 1st of January, 1887, the limits and boundaries of the town of Suva shall be as defined and set forth in a resolution of the Legislative Council of the previous November, which was as follows, viz., "Commencing at a point on the sea-coast *at high-water mark* on the southern side of Cakobau Road; thence by the southern side of Cakobau Road bearing 100° 05′, distance 79·00 chains"; (the southern boundary) "thence bearing 10° 05′, distance 89·40 chains"; (the eastern boundary) "thence bearing 280° 05′, distance 51·82 chains to a point on the sea-coast *at high-water mark* in Walou Bay"; (the northern boundary) "thence *by the sea-coast along high-water mark* in a south-westerly and southerly direction to the point of commencement"; (the boundary to seaward on the west).

The Court of First Instance held that the rates in question were invalid on the ground that the words "high-water mark" meant high-water mark as it existed at the time of the proclamation of 1886. The Chief Justice reversed that decision, on the ground that the land rated, being, as was conceded, above the high-water mark, as it existed at the time when the rate was made, was within the line of high-water mark, and so within the limits and boundaries of the town according to the true construction of the proclamation of 1886.

Their Lordships are of opinion that this view is correct.

Bearing in mind the almost universally variable character of such a boundary as that described, viz., by the sea-coast from a point on the coast at high-water mark to another point on the coast at high-water mark, (both points being themselves necessarily liable to obliteration, either by accretion or encroachment of the sea or other causes, and the intermediate line of coast being in its nature alterable from similar causes), it appears to their Lordships that it cannot have been the intention of the proclamation to create a boundary which should have the effect of requiring a fresh proclamation to bring within the town any land which from time to time might from any cause become within the continuous high-water line on the seaward side. Their Lordships do not desire to express any opinion as to what might be the case with regard to any land reclaimed on the foreshore, which is altogether outside of the continuous line of high-water; but they do not understand this to be such a case, nor is any such question raised by the appellants in their reasons, nor is it consistent with the statement referred to in the judgment appealed from.

The ground upon which the judge of the Court of First Instance held that the line as it existed in 1886 was still to be considered to be the western boundary of the town, was that in the case of another town in Fiji called Levuka, when certain lands upon the foreshore had been granted to certain persons by the Crown, a proclamation had been made bringing those lands within the boundaries of the town.

Their Lordships have had before them all the proclamations relating to the limits of Levuka, and they find nothing in those proclamations, nor in the facts stated in the Record, to shew that the lands brought within the limits of Levuka were lands within either the original high-water mark, or a new high-water mark, caused either by natural or artificial alteration.

The last proclamation in force in the case of Levuka up to the 5th of December, 1884, was one of the 10th of October, 1884, which described the seaward boundary of Levuka as "by the sea-coast along high-water mark." The proclamation of the 5th of December was relied upon as shewing that the Colonial

Legislature must have considered this to be a fixed unalterable line as it existed in October, otherwise there would have been no necessity for a fresh proclamation.

But on careful consideration of the terms of the proclamation of the 5th of December, their Lordships find that no alteration of the original boundaries is thereby made, but that the proclamation merely adds to the town certain specific portions of foreshore, of which grants had been made by the Crown to individuals, not stating that these were within any line of high-water mark outside of an original line; nor even that they adjoined the line of high-water as it existed in October.

In the present case, on the contrary, it appears from the language of the Chief Justice, that it was conceded "that the reclaimed portion of foreshore, the rates upon which are now sued for, is and was, when the rates were imposed, above the present high-water mark"; and this statement, so far as the fact is concerned, is not challenged in the reasons of the appellants.

Their Lordships therefore see no ground for thinking that the case of Levuka affords any reason for holding that the Local Legislature intended that the proclamation should fix the then existing line of high-water mark as the seaward boundary of the town as contended by the appellants.

The chief difficulty suggested in the way of holding according to the view of the Chief Justice, was that if the high-water mark, as it exists from time to time, is held to be the western boundary, and the high-water line, by accretion or otherwise, becomes shifted further to the west, then, inasmuch as the southern and northern boundaries are fixed as commencing and terminating respectively at points at high-water mark, and as being of a specified length, the town would lose on the east that which it would gain on the west by the amount of the addition of land on the west caused by the shifting of the high-water mark to westward. Moreover, it was observed, that if the original points at high-water mark are to be regarded as the points of commencement and termination of the southern and northern boundaries described, it would be physically impossible to follow the western boundary, as described in the proclamation, by merely following the new high-water line; for it would be necessary to reach those points in a totally different direction from that of the new high-water line, so as to complete the boundaries of the town.

Their Lordships are, however, of opinion that, while it was the intention of the proclamation, and while its true construction is, that the western boundary of the town should be the sea-coast at high-water mark as it should exist from time to time, it was not intended that the eastern boundary should be varied by any change of the high-water mark, or that the southern and northern boundaries should be invariably of the same length as the lines described in the proclamation. In order to fix the eastern boundary it was necessary to define the length of the lines commencing and terminating respectively at the northern and southern points chosen on the then line of high water; but when the eastern boundary was once fixed their Lordships are of opinion that it became the boundary of the town, not liable to be altered, except by fresh proclamation, and that the northern and southern boundaries were also sufficiently fixed by the two straight lines laid down in the proclamation, both merely requiring to be prolonged in a straight line as the high-water mark moves to the west, or shortened as it moves to the east, so as always to touch the high-water mark for the time being at their western extremity.

For these reasons their Lordships are of opinion that the judgment of the Chief Justice was right, and should be affirmed, and they will humbly advise Her Majesty to that effect.

Solicitors for the appellants: *Bompas, Bischoff, & Co.*

[PRIVY COUNCIL.]

J. C.* 1893 April 24, 25.

CAMERON AND ANOTHER . . . . DEFENDANTS;

AND

NYSTROM . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Negligence—Stevedore and Servant—Common Employment.

To an action to recover damages for injury caused by the defendants' servant, the defence of common employment is not applicable unless the plaintiff was at the time of the injury in the defendants' actual employment in the relationship of master and servant.

Where the defendants were stevedores, the plaintiff a servant of the shipmaster on whose ship the injury was caused, and the person whose negligence caused the injury was a servant of the stevedores, *held*, that the defence of common employment was not available.

Johnson v. *Lindsay* ([1891] A. C. 371) approved.

APPEAL from a decree of the Court of Appeal (April 27, 1891), confirming a verdict of a special jury in the Supreme Court (Canterbury District), whereby the appellants were ordered to pay to the respondent £750 damages with costs.

The action was in respect of injuries sustained by the respondent through the negligence of the appellants under the circumstances disclosed in the judgment of their Lordships. The defence was threefold: (1.) a general denial; (2.) negligence of the respondent; (3.) that he and the appellants' workmen were engaged in a common employment at the time of the injury.

Williams and Denniston, JJ., held that the appellants were separate and independent contractors, and subject to no control of the captain of the ship; and also that there was no contributory negligence on the part of the plaintiff.

The Chief Justice and Edwards, J. (who as junior judge withdrew his judgment, the Court being equally divided), held that the appellants were under the control of the captain, and that they and the respondent were engaged in a common employment.

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and the HON. G. DENMAN.

Bigham, Q.C., and *Sharpe*, for the appellants, contended that the Chief Justice's view was right, and that both the appellants and their servants were on the evidence under the orders of the captain. The appellants were, therefore, in a common employment with the respondent. If, on the other hand, the appellants were not under the orders of the captain, but acting with independent authority, then it must be considered that on the evidence the person who did the injury was not so much in their employ as in that of the captain. In either view the respondent was not entitled to succeed, and moreover the evidence shewed that he was guilty of contributory negligence. Reference was made to *Johnson* v. *Lindsay* (1), and to *Murray* v. *Currie* (2).

Ollivier, for the respondent, was not heard.

1893
April 25.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

The respondent, the plaintiff in this action, was a seaman employed on board the vessel *Brahmin*. He was at work upon that vessel at the time when he received the injury in respect of which the action was brought. The injury was caused by the fall of some coils of wire, owing to the breaking of part of the gear which was being used in the discharging of the cargo. The discharging gear was, as the jury have found, fixed in an improper and negligent manner, and its being so fixed was the cause of the injury to the plaintiff.

The defendants were a firm of stevedores employed in discharging the vessel. They were engaged as stevedores by the master of the vessel to discharge her at the rate of so much a ton. The vessel was to find the gear, but the stevedores brought their own men, foreman and workmen, to effect the discharge. The person guilty of the negligence was the foreman of the defendants, a man named Gellatly, who rigged up the gear.

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(1) [1891] A. C. 371.

(2) Law Rep. 6 C. P. 24.

The question raised in the action was whether, in those circumstances, the defendants were responsible to the plaintiff for the injury he received.

At the trial, apart from a subsidiary question of contributory negligence, to which their Lordships will call attention presently, the only defence raised, beyond the defence that there was no negligence—a defence which has been negatived by the jury—was that the plaintiff could not maintain an action against the defendants, even assuming that the foreman was their servant, and that it was by his negligence the injury was occasioned, because the plaintiff was engaged in a common employment with the stevedores' men, and that their being thus engaged in a common employment precluded the plaintiff in point of law from any right of action.

At the time when the question was argued before the Court below, the case of *Johnson* v. *Lindsay*, in which there was a difference of opinion in the Court of Appeal, had been decided in the Court of Appeal (1), but not in the House of Lords (2). The majority of the Court of Appeal had held, Fry, L.J., dissenting, that it was not necessary to the defence of common employment that the plaintiff should be in the employment of the master whose servant's negligence caused him injury. The majority of the Court came to the conclusion that the sub-contractor and his servants might all be regarded as in the employment of the contractor, whose servant the plaintiff was, and that this sufficed to establish the defence of common employment. In the House of Lords the decision was reversed, and it was held that in order to make this defence available there must not only be common employment, but common employment under the master whose servant was guilty of negligence.

It is to be observed that the question of common employment only arises as a defence, on the assumption that the person who did the injury was the servant of the person sued. Unless this be the case the person sued is under no liability, because he is sued in respect of an injury not caused by himself or by anyone for whom he is responsible. And therefore common employment only becomes necessary as a defence, and is only relevant when

(1) 23 Q. B. D. 508.

(2) [1891] A. C. 371.

the person doing the injury is a servant of the person sued. In their Lordships' opinion the House of Lords has determined that where the person sued has committed negligence by one of his servants the defence of common employment is only available to him where he can shew that the person suing was also his servant at the time of the occurrence of the injury. In the judgment delivered by one of their Lordships in the case of *Johnson* v. *Lindsay* (1) the law was thus stated: "These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for the negligence of his servant can shew that the person so seeking to make him liable was himself in his service, the defence of common employment is not open to him." It is clear, therefore, that in the present case the defence of common employment can only arise and be successful if the defendants can shew, admitting that the negligence of their foreman Gellatly caused the injury, that the plaintiff was in their service. Otherwise the doctrine of common employment has no application. When that was once found to be the law, and the learned counsel who appeared for the defendants was pressed with it, he admitted that it was impossible for him, after the decision of the House of Lords in *Johnson* v. *Lindsay* (1), to maintain that the defendants were free from liability by reason of the doctrine of common employment.

But he then contended that the defendants were not liable, inasmuch as the person who caused the injury was not at the time really acting in the service of the defendants, but as the servant of the shipowner. No doubt if that could be established it would afford a defence to the action. This appears to be the only question open on this appeal, after the decision in *Johnson* v. *Lindsay* (1).

When the evidence is examined the contention appears to their Lordships to be utterly untenable. Gellatly was employed and paid by the stevedores. At the time when he was doing the work in question he was doing it for the stevedores, inasmuch as the stevedores were to be paid a lump sum for discharging the vessel; and it was to enable them to earn the sum so contracted to be paid to them that Gellatly was working at the time he did

(1) [1891] A. C. 371.

the act complained of. There was thus present every element necessary to establish that he was the servant of the stevedores. The case for the defendants must go this length, that the stevedores would not have been liable, but that the shipowner would, to any person injured by the negligence of one of the stevedores' men. It seems to their Lordships only necessary to state the length to which the proposition of the defendants must go to shew that it cannot be sustained.

Reliance was placed upon expressions used in the evidence, with regard to the extent to which the mate and master had the right to direct and control the acts of the stevedores' servants. That does not seem to their Lordships in the least inconsistent with their being the servants of the stevedores, and not the servants of the shipowner. There was no express agreement with regard to the extent to which the master and mate should have control over them. That control is only to be implied from the circumstances in which they were employed. The relation of stevedore to shipowner is a well-known relation, involving no doubt the right of the master of the vessel to control the order in which the cargo should be discharged, and various other incidents of the discharge, but in no way putting the servants of the stevedore so completely under the control and at the disposition of the master as to make them the servants of the shipowner, who neither pays them, nor selects them, nor could discharge them, nor stands in any other relation to them than this, that they are the servants of a contractor employed on behalf of the ship to do a particular work.

For these reasons their Lordships think that the main question raised in this action must be decided in favour of the plaintiff.

Another question was raised at the trial: whether the defendants are exempt from responsibility, because the plaintiff was in a position in which he would be likely to be injured if any accident happened to the discharging gear. The jury found that placing the defendant where he was working at the time of the accident was in the circumstances an act of negligence. It was admitted by the learned counsel for the defendants that unless that involved, and it clearly does not involve, a finding of personal negligence on the part of the plaintiff, it was impossible to argue that it was a defence to the action.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from should be affirmed, and the appeal dismissed with costs.

Solicitors for appellants: *Lee, Bolton, & Lee.*
Solicitors for respondent: *A. R. & H. Steele.*

[PRIVY COUNCIL.]

COMMERCIAL BANK OF TASMANIA . PLAINTIFF;

AND

JONES AND ANOTHER . . . . DEFENDANTS.

J. C.*
1893
March 9;
May 13.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

Principal and Surety—Novation—Release of Principal Debtor—Discharge of Surety.

Where a creditor released his principal debtor and accepted a third party as full debtor in his stead, and the surety for the former debtor agreed to give a guarantee for the latter, and to continue his former guarantee until he did so, and then died without having given it:—

Held, in an action by the creditor against his executors, that, the former debt having been extinguished by the release, the remedy against the deceased was gone.

Novation of debt operates as a complete release of the original debtor, and cannot be construed as a mere covenant not to sue him.

APPEAL from an order of the Full Court (August 22, 1891), setting aside a verdict for the appellant, and entering the same for the respondents.

The facts are stated in the judgment of their Lordships.

Sir *Horace Davey*, Q.C., and *W. Baker*, for the appellant.

The Solicitor-General (Sir *John Rigby*), and *Swinfen Eady*, for the respondents.

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* *Present:*—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

1893. May 13. The judgment of their Lordships was delivered by

LORD MORRIS:—

This case comes on appeal from an order of the Supreme Court of Tasmania made on the 22nd of August, 1891. The appellants sued the respondents, as executors of James Bonney deceased, to recover a sum of £600 under a guarantee dated the 15th of September, 1884, from James Bonney to the appellants, whereby, in consideration of advances to be made from time to time by the appellants to George Andrews Wakeham, James Bonney guaranteed to the appellants the payment on demand of all such advances not exceeding the sum of £500, together with bank interest, and it was thereby provided that the said guarantee was to be a continuing and existing one for the amount from time to time due to the appellants from George Andrews Wakeham directly or indirectly, irrespective of any moneys which might at any time or times be paid into the bank to the account of George Andrews Wakeham, or of any settlement of accounts, or of any advances beyond the moneys thereby secured, and that the guarantees might be determined by notice as therein stated, and that the appellants might at any time with or without the consent of James Bonney, and notwithstanding his dissent, compound with George Andrews Wakeham or any of the parties to any negotiable security received by the appellants from or on account of George Andrews Wakeham, for the whole or any part of his or their liabilities to the appellants, or might give time for discharging the same or any part thereof as the appellants might deem proper, and might take security from George Andrews Wakeham and release or discharge him or any of the parties to any bills or notes discounted by them, and might enter into arrangements with the said George Andrews Wakeham or with any other person or persons in relation thereto as the appellants might think expedient, and that no such composition, granting of time, taking of security, release, discharge, or arrangement, should have the effect of releasing or in anywise affecting James Bonney's liability under the guarantee.

By indentures of mortgage, dated respectively the 31st of March, 1885, the 1st of February, 1887, and the 21st of August, 1888, Wakeham conveyed to the appellants certain properties by way of security for the advances to him. In the year 1889, Wakeham was indebted to the appellants to the amount of about £2400, and being so indebted he entered into an agreement with one Alfred John Marshall for a nominal consideration to convey to him the properties comprised in the said indentures of mortgage subject to the said mortgages. Wakeham and Marshall waited on Allonby, the manager of the appellant bank, who consented that Wakeham's liability to the bank should be transferred to Marshall. This arrangement so made between Wakeham and Marshall was not carried out as agreed between them, and instead thereof it was arranged between Wakeham, Marshall, and Allonby, that the bank should accept Marshall as its debtor in room and stead of Wakeham, and should, with that view, re-convey to Wakeham the properties mortgaged by him; that Wakeham should convey the properties to Marshall; and that Marshall should thereupon mortgage the same to the bank for the amount due.

Accordingly, by three several indentures, dated respectively the 6th of February, 1890, and made between the appellants of the one part and Wakeham of the other part, the appellants, in consideration of all moneys secured having been in each case paid, re-conveyed the properties comprised in the three several indentures of mortgage of the 31st of March, 1885, the 1st of February, 1887, and the 21st of August, 1888, discharged from all principal moneys and interest secured by the same, and from all claims and demands thereunder. By three several indentures of equal date, and made between Wakeham of the one part and Marshall of the other part, Wakeham conveyed the said properties to Marshall in fee simple.

By an indenture of the same date, and made between Marshall of the one part and the appellants of the other part, Marshall conveyed the said properties to the appellants by way of mortgage to secure the payment to the appellants of the said sum of £2400, and any further sum which might become due by Marshall to the appellants.

James Bonney died on the 12th of April, 1890, without giving any guarantee to the appellants in respect of Marshall, although he had, according to evidence of the bank manager, agreed to do so, and that his guarantee for Wakeham should continue until he did so. The appellants, after the death of Bonney, demanded from the respondents, as his executors, payment of the sum of £600 with interest, as secured by the said guarantee of the 15th of September, 1884. The respondents refused payment, whereupon the appellants brought their action to recover the amount. The case came on for trial before Dodds, J., and a jury. A verdict was given for the appellants, but leave was reserved to the respondents to move to set aside the verdict. The rule came on for hearing before the Supreme Court, consisting of the Chief Justice, and Adams and Dodds, JJ., whereupon the Court set aside the verdict and ordered a verdict to be entered for the respondents.

Their Lordships concur in that judgment. It may be taken as settled law that where there is an absolute release of the principal debtor, the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone. Language importing an absolute release may be construed as a covenant by the creditor not to sue the principal debtor, when that intention appears, leaving such debtor open to any claims of relief at the instance of his sureties. But a covenant not to sue the principal debtor, is a partial discharge only, and, although expressly stipulated, is ineffectual, if the discharge given is in reality absolute. In this case, the acceptance of Marshall as full debtor, in room and stead of Wakeham, which constituted a complete novation of the debt, necessarily operated as an absolute release of Wakeham, and it is therefore in vain to contend that such novation merely amounted to a covenant not to sue the debtor for whom the respondent was surety.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellant: *Nisbet, Daw, & Nisbet.*
Solicitors for the respondents: *Snow, Snow, & Fox.*

[PRIVY COUNCIL.]

MERCANTILE BANK OF SYDNEY . . . PLAINTIFF;

AND

TAYLOR . . . . DEFENDANT.

J. C.*
1893
April 20, 21;
May 13.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Principal and Surety—Release of Co-surety—Discharge.

In a suit against one of five joint and several sureties to recover the amount guaranteed, it appeared that the plaintiff had, without the defendant's knowledge and consent, released another of the sureties "from all debts due by him to the bank at this date":—

Held, that the plaintiff could not recover, and that the legal effect of the release could not be modified by evidence of verbal negotiations prior to the release for the purpose of shewing an agreement to reserve rights against the sureties.

APPEAL from an order of the Supreme Court (Dec. 14, 1891) discharging a rule nisi to set aside a verdict for the respondent, and to enter a verdict for the appellant for £5650.

The facts are stated in the judgment of their Lordships. A report of the case in the Court below will be found in 12 New S. Wales L. R. p. 252.

Byrne, Q.C., and *Sargant*, for the appellant, contended that on their true construction the words "debts due by you to the bank at this date" in the letter of the 5th of April, 1891, did not, apart from parol evidence, include Griffin's liability under the bond of the 17th of July, 1885. The evidence shews that the release was not intended by either party to include that liability. Parol evidence, moreover, ought not to have been excluded which would have shewn the intention, especially as regards the reservation of the appellants' rights against other persons. Griffin has never been actually released from his liability; even if he had been as between him and the appellant, such release did not in any way prejudice the respondent or discharge him from his liability as a co-surety. Reference was made to *Wyke* v. *Rogers* (1); *Griffin* v. *Mercantile Bank* (2); *Morley* v. *Inglis* (3); *Luckie* v. *Bushby* (4); *Norton* v. *Wakefield* (5); *Townshend* v. *Stangroom* (6); *Woollam* v. *Hearn* (7).

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* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and the HON. GEORGE DENMAN.

Sir *Horace Davey*, Q.C., and *V. R. Smith*, for the respondent, were not heard.

1893
May 13.

The judgment of their Lordships was delivered by

LORD WATSON :—

By bond dated the 17th of July, 1885, the respondent John Taylor became one of five joint and several sureties for a cash credit to the amount of £10,000, which the appellants, the Mercantile Bank of Sydney, agreed to allow to the Australasian Powder and Explosives Manufacturing Company. The liability of the co-sureties, in so far as related to principal moneys, exclusive of interest or costs, was restricted to £8000.

The company subsequently went into liquidation, owing a large balance upon account current, which was partly covered by securities deposited with the bank. On the 4th of May, 1888, the appellants made a demand upon each of the five sureties for payment of £10,357 16*s.* 11*d.*, being the amount, with interest to date, of the principal debtors' overdraft. This action was brought by the appellants in June, 1890, against the respondent, before the Supreme Court of New South Wales, for the purpose, inter alia, of recovering from him, as surety, the amount of the overdraft, which had, by that time, been considerably reduced by realization of the principal debtors' securities.

The only defence stated for the respondent which was referred to in the argument upon this appeal was founded on the allegation that the appellants had, without his knowledge or consent, agreed to release John George Griffin, one of his co-sureties, and had thereby materially altered the contract to which he became a party in July, 1885. In replication, the appellants pleaded that Griffin's co-suretyship with the respondent was not within the terms of the release; and they specially averred that it was a term of their agreement with Griffin that all the rights and remedies of the bank against the respondent and the other co-sureties were to be reserved, and that such rights and remedies were not to be prejudiced or affected. Under that plea, the appellants maintain that Griffin, though discharged from liability in a question with the bank, agreed to remain, and still remains liable in contribution to any of his co-sureties who may pay up the whole or part of the balance still due to the bank by the Australasian Powder and Explosives Manufacturing Company.

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(1) 1 D. M. & G. 408.
(2) 11 N. S. W. L. R. Eq. 231.
(3) 4 Bing. N. C. 58.
(4) 13 C. B. 864.
(5) 13 Q. B. 536.
(6) 6 Ves. 328.
(7) 7 Ves. 211; 2 W. & T. 508.

The case was tried before Stephen, J., and a jury, who returned a verdict for the respondent. Leave was, of consent, reserved to the appellants to move the Court to enter a verdict in their favour for £5650 16*s.* 9*d.*, which the parties agreed was the amount of the balance then due by the principal debtor.

It was proved at the trial that Griffin, besides his suretyship for the Australasian Company, had other dealings with the appellants, both as principal and as guarantor, and was largely indebted to them on several accounts. He had become apprehensive that the appellants might take measures for enforcing these liabilities, which would seriously affect his position as a member of the Sydney Stock Exchange; and there had been verbal communications between him and the bank authorities with a view to an amicable settlement. These negotiations had not led to any definite result; and, on the 27th of March, 1889, Griffin sent a letter to Mr. Wilson, the general manager of the bank, in these terms:—

"Referring to the proposal made by me, and which I understand is agreed to by you, on behalf of the bank, viz., that I should assign to the bank all my equities in the various securities held by the bank on my behalf, in consideration of receiving from the bank a release of my present indebtedness to it."

"I now request you to take the necessary legal steps to carry out this proposal, &c."

The bank declined to accept the proposal thus made; and, on the 5th of April, 1889, the general manager wrote to Griffin as follows:—

"Referring to our conversation, I have to inform you that my directors are willing to grant you a release *from all debts due by you to the bank at this date,* on condition of your conveying to the bank, within one month from this date, all other real estate which you may be entitled to, and within the same time conveying to the bank your equity of redemption in and to all the mortgage and other securities now held by the bank from you for moneys now due by you to the bank."

That letter was handed by the bank manager to Griffin, who verbally intimated his acceptance of the offer which it contained, in these terms: "It takes a little more than I intended, but I am content." It was then agreed that, in order to save expense, the bank's solicitors should prepare the necessary documents, and carry out the arrangements thus concluded. Griffin stated in the witness-box that there had been delay in completing the settlement, which was not imputable to him; and—apparently in order to supersede the necessity of carrying the inquiry further—the parties made the following admission before the jury:—

"It is admitted that Griffin did convey to the plaintiffs his equity of redemption in and to certain of the said mortgages and other securities, and conveyed certain portions of his said real estate to the plaintiffs, and the plaintiffs then accepted and now hold the same."

In the course of Griffin's examination, the appellants' counsel, without putting any question, moved the presiding judge for permission (1.) to interrogate the witness for the purpose of proving by parol, "that there was an agreement to reserve rights against the sureties"; and (2.) to interrogate him as to conversations "to explain the meaning of the word 'indebtedness.'" The learned judge rejected the evidence tendered on both points.

The appellants obtained a rule to shew cause why the verdict of the jury should not be set aside and a verdict entered for them for £5650 16*s.* 9*d.*, pursuant to leave reserved, or why a new trial should not be granted. The reasons assigned in the rule were that the presiding judge had erred, (1) in excluding evidence of conversations between Griffin, the manager of the bank, and the chairman of the board of directors, prior to the bank's letter of the 5th of April, 1889; and (2.) in holding that the liability of Griffin, as co-surety with the respondent, came within the definition of the words "indebtedness" and "debts" in the letters of the 27th of March and 5th of April, 1889.

The Court, consisting of Windeyer, Innes, and Manning, JJ., upheld all the rulings complained of, and discharged the rule with costs. Their Lordships, in the circumstances of this case, have had no difficulty in agreeing with their decision.

If the appellants' case had rested upon the notes of what occurred at the trial, it might have opened a very wide field of discussion; because, in that case, the onus might have been upon the respondent to shew that no parol evidence could by possibility be competent. But the controversy is narrowed by the terms of the rule, which limit the evidence tendered to proof of previous verbal negotiations, for the purpose of adding a new term to the written contract of the 5th of April, 1889, and of putting a construction upon an expression occurring in that contract which it does not naturally bear.

It appears to their Lordships that no foundation was laid at the trial for the admission of any such evidence as the appellants proposed to adduce. It had been proved that the whole terms of the agreement under which Griffin became entitled to his release were embodied in the bank's letter of the 5th of April, 1889, which he accepted without reservation or qualification. On that assumption, it is plain that the previous verbal communications which had passed between him and the bank were completely superseded, and could not be legitimately referred to, either for the purpose of adding a term to their written agreement, or of altering its ordinary legal construction. But that is what the appellants proposed to do, without attempting to impeach the testimony which established that their letter of the 5th of April, 1889, accepted by Griffin, constituted the sole contract between them.

Upon the question whether the balance owing by the Australasian Powder and Explosives Manufacturing Company, of which

J.C.
1893
MERCANTILE BANK OF SYDNEY v. TAYLOR.

the appellants had demanded payment from Griffin as one of their sureties, was a debt due by him to the bank within the meaning of the letter of the 5th of April, their Lordships have nothing to add to what was said by the learned judges in the court below.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from. The appellants must pay the costs of this appeal.

Solicitor for the appellants: *G. P. Slade.*
Solicitors for the respondent: *Walker, Martineau & Co.*

[PRIVY COUNCIL.]

J. C.*
1893
April 20.

THE COUNCIL OF THE BOROUGH OF RANDWICK . . . . PLAINTIFF;

AND

THE AUSTRALIAN CITIES INVESTMENT CORPORATION, LIMITED . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Municipalities Act of 1867, s. 163—*Construction—Practice as to raising a new point.*

Where by sect. 163 of New South Wales Municipalities Act of 1867, "land the property of Her Majesty and unoccupied or used or reserved, or vested in trustees for public purposes" was exempted from rateability;

Held, that on its true construction lands not the property of Her Majesty, but occupied by a municipality for the purpose of water supply, were within the exemption.

It appearing that the point whether the land in question was in fact used for public purposes had not been raised in the Court below or in argument before the Full Bench, *held* that it was too late to raise it before their Lordships.

APPEAL from an order of the Supreme Court (Nov. 23, 1891) directing that the verdict entered by consent for the appellant should be reduced to £98 15*s*.

The appellant sought to recover certain rates assessed by them under the Act of 1867 (31 Vict. No. 12) upon certain land lying within the borough of Randwick.

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and the HON. G. DENMAN.

The facts are stated in the judgment of their Lordships.

Jelf, Q.C., and *Danckwertz*, for the appellant.

The Solicitor-General (Sir *John Rigby*), and *Sargant*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

The question raised by this appeal is the construction of the 163rd section of the Municipalities Act of 1867, a statute of New South Wales. That section renders liable to rating "all lands houses warehouses counting-houses shops and other buildings tenements or hereditaments within any municipality." It then provides for the following exceptions:—"Land the property of Her Majesty and unoccupied or used or reserved or vested in trustees for public purposes land and buildings in the occupation of the Imperial Government or the Government of New South Wales or of the council of the municipality hospitals benevolent institutions and buildings used exclusively for public charitable purposes churches chapels and other buildings used exclusively for public worship all schools subject to the provisions of the Public Schools Act of 1866 colleges and universities." It is upon the construction of the words which provide for these exceptions that the question raised by this appeal turns.

Certain lands were occupied by the Municipality of Sydney for the purpose of water supply. It was, at the trial of the action, contended that this property was exempt from rateability inasmuch as it was "used or reserved or vested in trustees for public purposes." On the part of the appellants it was said that these words were only applicable to land which was the property of Her Majesty, and that even if "used or reserved or vested in trustees for public purposes," the land was not exempt from rateability if it were not property belonging to Her Majesty. The exception commences with the words "land the property of Her Majesty and unoccupied," and then come the words upon which so much discussion has turned, "or used or reserved or vested in trustees for public purposes." The real question is whether the words "or used or reserved or vested in trustees for public purposes" are to be coupled only with the word "unoccupied" which immediately precedes them, and treated as alternative cases to unoccupied land, being governed like it by the words "the property of Her Majesty," or whether the words in question are to be treated as coupled with the word "land" which introduces the exception.

Their Lordships do not think that there is anything in the general framework of the section to point as suggested very decidedly to the conclusion at which the appellants ask their Lordships to arrive. No doubt there has been a good deal of ingenious criticism for the purpose of shewing that the words "used or reserved or vested in trustees for public purposes" ought to be coupled with the word "unoccupied" which they follow, rather than with the word "land." But their Lordships do not think there is sufficient in those criticisms to establish that the construction contended for by the appellants is necessarily the right one. No doubt if there were some very good reason for drawing a distinction between land the property of Her Majesty used for public purposes, and other land not the property of Her Majesty used for the same purposes, it is possible that the points upon which stress has been laid might have enabled their Lordships to come to the conclusion desired by the appellants. But no solid reason was put before their Lordships for the distinction as to rateability which is supposed to be drawn by the provisions of this section if the appellants' view is correct. It does not appear to their Lordships that there is the least difficulty in coupling the words "or used or reserved or vested in trustees" with the word "land," and indeed if the contention of the appellants be correct their Lordships would not have expected to find the word "and" where it is found, but rather the word "whether" or the word "either," which would have been the more natural words to have used if the intention were to couple the words which follow "unoccupied" with the words "the property of Her Majesty,' as alternative descriptions of land belonging to Her Majesty. If the matter had been res integra their Lordships would certainly have been disposed to come to the conclusion that the construction which has been put upon the clause by the Court below was correct. But when it is remembered that this construction was put upon this section as long ago as the year 1880, that it has been repeated in several decisions since, that no fewer than six learned Judges in the Courts of New South Wales have expressed their opinion in accordance with that view, it would require very decisive weight in the one direction rather than the other to induce their Lordships now to adopt a different construction.

For these reasons their Lordships do not see any ground for differing from the judgment arrived at by the Court below.

It was sought to raise another point, that, admitting the section to have been properly construed by the Court below, the lands now in question were not in fact used for public purposes within the meaning of the section. That point does not appear to their Lordships to have been raised in the Court below. There is nothing to shew that it was raised at the trial. That would not perhaps have been material if it had been raised in the argument before the Full Court; but their Lordships think it is impossible, after reading the judgments in the Court below, to come to any conclusion but this, that the point was not argued or raised there, and that the only point there argued was the construction of the section in the particular to which their Lordships have called attention.

In these circumstances their Lordships think it was not open to the appellants to bring that point before this Board, and that great inconvenience, and even, it may be, injustice, would result, if a point of this description which may have been deliberately abandoned, or for some reason or other not taken in the Court below, were permitted to be raised for the first time before this Board, even if there were materials before the Board sufficient to enable a judgment to be pronounced upon the point, in case it had been taken in the Court below.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *H. Kimber & Co.*
Solicitor for respondent: *G. P. Slade.*

[PRIVY COUNCIL.]

J. C.*
1893
May 4, 5, 6; June 17.

ATTORNEY GENERAL AND RECEIVER GENERAL FOR JERSEY . . . . . PLAINTIFFS;

AND

TURNER, THE SOLICITOR GENERAL FOR JERSEY (ON BEHALF OF THE PUBLIC) DEFENDANT.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey—Alienation in Mortmain of Seigneurial Lands—Rights of Seigneur—Indemnity.

Where land in Jersey held of the Queen as lady of the seigneurie thereof is brought into mortmain, *held* that the purchaser is bound to pay to the Crown the indemnity due by law in respect of the consequent loss or diminution in value of the seigneurial rights. But the Crown is not also entitled by the custom of the island to preserve its seigneurial rights by interposing a nominal vassal called " homme vivant mourant et confisquant " between itself and the holders in mortmain in order to pay duties and service in respect of the property.

To ascertain the amount of indemnity, the Court should not refer it generally to experts, but should itself fix the percentage to be paid by the purchasers, and refer it to experts to ascertain the true value of the property.

APPEAL from a decree of the Superior Number of the above Court (Oct. 8, 1891) affirming two judgments of the Inferior Number thereof (May 8, 1890, and May 7, 1891).

The questions in the appeal relate to the rights of the Crown as seigneur of a fief, in respect of lands forming parcel of the fief, which have fallen into mortmain, and, shortly stated, are two (1.) the amount to be paid to the seigneur by way of indemnity for the loss of seigneurial dues and services, and (2.) whether, besides the indemnity, the seigneur is entitled to be perpetually furnished with " homme vivant mourant et confisquant " to discharge the rents and render services due from a vassal.

By a contract or deed of sale and purchase (contrat) dated the 30th of March, 1889, Thomas Godfray sold in perpetuity for himself and his heirs to the respondent, authorized by the sanitary committee of the island, for and in the name of the public, two houses joining each other and known by the name of "Overdale," with the buildings and gardens adjoining thereto, by the description and subject to the terms and conditions in the said deed expressed. The deed (inter alia) stated that the premises had been valued in accordance with law as therein mentioned at the sum of £1200 sterling; and the sale was by the deed expressed to be made, first, for the consideration and on the condition that the public of the island should pay, acquit, and discharge the seigneurial rights which might become due for and in respect of the said premises, and, secondly, in consideration of the sum of £1200 sterling payable to the vendor in manner therein mentioned, and as to all the said premises, was expressed to be made free and discharged from all rents and renders (rentes et redevances) except the said seigneurial rights. The premises are situate in the parish of St. Heliers and form parcel of a fief which formerly belonged to the Abbot of Bellozanne, but which is now vested in the Crown.

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* *Present* :—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

On the 29th of April, 1889, the appellant, the Receiver General, wrote to the respondent, requiring him forthwith to give up possession of the said premises or to pay to Her Majesty, as lady of the said fief, the indemnity according to law, and to furnish "homme vivant mourant et confisquant." The respondent, in reply to this claim and acting under the orders of the sanitary committee, by letter dated the 24th of September, 1889, offered the sum of £36 in payment of the indemnity.

This offer was refused on the ground of the sum offered being below the legal rate of indemnity due for property aliened in mortmain, and the appellants forthwith commenced an action against the respondent acting for and in the name of the public under the orders of the sanitary committee, by which they claimed that as the property in question had by reason of the sale fallen into mortmain, the respondent should either give it up or should pay to Her Majesty as lady of the fief the indemnity according to law, and furnish her with "homme vivant mourant et confisquant" to the property.

The order of the 8th of May, 1890, dismissed a preliminary objection as to parties. The decree of the 7th of May, 1891, ordered the Vicomte to go upon the spot and call experts on oath to determine the amount of indemnity due to the Queen as lady of the fief for such time as the property should remain in mortmain. He reported that six experts unanimously fixed the amount of indemnity at £36.

The Superior Number unanimously affirmed this judgment, and decided that, according to the custom of the island, the seigneur has no right to an indemnity as well as to "un homme vivant mourant et confisquant" to discharge and pay the services and dues due in respect of real estate fallen into mortmain.

The Solicitor General (Sir *John Rigby*), *W. H. Venables Vernon* (*Attorney General for Jersey*), and *Sutton*, for the appellants :—

The decision of the Superior Court was erroneous, and as regards the claim for a "homme vivant, &c.," was on a point which the respondent had not put in issue in the First Court. By the law of Jersey the Crown could compel the States to vacate the possession of the property in suit unless furnished both with a "homme vivant, &c.," in respect thereof, and also with a pecuniary indemnity. The mortmain law established in England by 7 Edw. 1, c. 2, and 15 Ric. 2, c. 5, forbidding corporations to hold land without licence from the Crown, prevails in Jersey. In Normandy, also, the Crown had from the earliest times a right to resume possession of property passing into mortmain where the purchaser had not obtained its licence of "amortissement." In this appeal the sole right claimed was the right of the lord to be secured against any diminution of his seigneurial rights and dues by reason of property within his fief falling into mortmain. As to the nature of this right in Jersey, reference was made to the Coûtume Réformée of Normandy, arts. 139, 140, and 141, which, in this respect, is merely a reproduction of the Ancienne Coûtume, and to the commentators Basnage, Poingdestre, Bérault, Routier, and Le Geyt, thereon. From them it results that the obligation was to furnish both the homme vivant, &c., and an indemnity; that the amount of indemnity was in the case of a fief, one-third of the purchase price or of the value of the property. As regards the rights and dues to be furnished by the said homme or vicaire as he was called, they included fealty, and homage (where due), suit of Court, payment of rents and other dues, forced labour, appearance at the annual "gage-pleige," &c. On the death of the vicaire the lord took the reliefs and other dues, and a new vicaire was appointed. These rights and dues were not covered by the indemnity. The other seigneurial rights and dues to which the indemnity applied were retrait féodal, the lord's right of pre-emption when the tenant sold, and other dues payable on a sale by the tenant or on the death of a superior lord and other occasions, and also his right of wardship during the tenant's minority. The Jersey commentators, Poingdestre and Le Geyt, recognise this rule. So also the Jersey decisions. But at the same time the Norman seigneurial rights have been altered in some particulars in Jersey: see Recueil des Lois, tom. 1, p. 195, tom. 2, p. 478; Jersey Code of Laws, 1771, pp. 223–5. For judicial decisions as to the rights of the lord, see *Thornton* v. *Robin* (1); *Godfray* v. *Le Breton*, decided in 1837 by the Superior Number; *Godfray* v. *Le Breton*, in 1838; *Godfray* v. *Marett*, in 1856; *Godfray* v. *Filleul*, in 1855; *Perchard* v. *Baudains* (1855), see Recueil des Lois, tom. 2, p. 192, et seq. Reference was also made to Flaust on the Coûtume de Normandie, ed. 1781, c. 7, containing comments on arts. 139–142 of Coûtume Réformée; Pothier, Traité des Fiefs, ed. Dupin, tom. 8, pp. 87, 88.

With regard to the rate of indemnity, the appellants, in accordance with the prevailing practice, were content to take 4 per cent. on the purchase-price, but could not be compelled to accept a lesser indemnity. Besides, there was no ground for referring the amount of indemnity to the Vicomte and experts. The Court should have decided the rate as matter of law, and left the value only to the experts.

Haldane, Q.C., *Sheldon*, and *Hawksford*, for the respondent:—

With regard to the amount of the indemnity, the practice is that sworn experts assess and name a lump sum as a reasonable indemnity. It is not the custom for them to value the land and then assess the indemnity at a particular percentage thereon.

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(1) 1 Moo. P. C. 439.

The rate of indemnity was fixed by a law of 1862, in respect of lands acquired under that law and thereby falling into mortmain at 4 per cent. for "terrains nus," and 3 per cent. for "maisons" on the contract price or value. That law is important as shewing the value of the seigneur's rights. Further, it was contended that the indemnity, both under that Act and in all other cases, was in full satisfaction and discharge of all the rights of the seigneur so long as the land should remain in mortmain. It had never been the law or custom in Jersey, in addition to paying such indemnity, to furnish the lord with "homme vivant mourant et confisquant." The decisions and authorities cited on the other side were examined to shew that they contained no authority to that effect. Under the old law and practice, if and so soon as the land ceased to be held in mortmain, the seigneurial rights revived and the land again became subject to the rents, dues, and services formerly due in respect thereof. Meanwhile the indemnity covered all such rights and dues, whether it was ascertained according to the old practice, or under the law of 1862; and there was no obligation to provide a man as well as an indemnity. Besides, under a law of 1870, confiscation of land and goods was abolished, and thereafter there could not possibly be any claim by the lord to a "homme confisquant."

Vernon, replied.

1893
June 17.

The judgment of their Lordships was delivered by the

EARL OF SELBORNE:—

The States of Jersey having purchased, for the public purpose of establishing a fever hospital, certain heritable property in the parish of St. Heliers, held of the Queen as lady of a seigneurie anciently belonging to the Abbot of Bellozanne, and having failed to come to an agreement with the representatives of the Crown as to the satisfaction to be made for the loss or diminution in value of seigneurial rights consequent on the land being brought into mortmain, the action out of which this appeal arises was brought in 1889 by the Attorney-General and Receiver-General for Jersey against the respondent, as authorized for that purpose to represent the public of the island;

claiming (in the form which seems to be usual in such cases) that the defendant, as such representative of the public, should either give up possession of the purchased premises, or pay to the Crown the indemnity due by law, "et lui bailler homme vivant, mourant, et confisquant pour ladite propriété, comme en tel cas est requis."

The meaning of the words "bailler homme vivant," &c., is thus explained by Routier, one of the text-writers cited by the appellants. They require the nomination of a person "on whose death the rights and profits of the fief will accrue to the lord. In a word, it is this man, 'vivant mourant et confisquant,' who represents the vassal, and against whom the lord is in a condition to exercise all his rights." Whether a simple nomination would be sufficient was a point not touched by the argument. The Judicial Committee, in *Thornton* v. *Robin* (1), seems to have understood that there would be a conveyance to the person so nominated, making him a trustee for the holders in mortmain; but their Lordships find no other authority for that statement. Terrien says that, in the Coûtume of Orleans, a person so nominated was called the "vicaire," or substitute, of those nominating him. Whatever might be the form, whether simple nomination or anything more, the effect in law was the same.

The action was tried before the Inferior Number of the Royal Court of Jersey, sitting as a Court of Heritage, on the 8th of May, 1890. They referred it to the Vicomte to settle, upon a view of the property and with the assistance of sworn experts, the amount of the indemnity due to the Crown, "for so long as the property had been or might remain in mortmain." The experts fixed the amount at £36, and the Vicomte's report to that effect, was registered by Act of Court. The officers of the Crown appealed to the Full Court, or Greater Number, who, on the 8th of October, 1891, unanimously rejected the appeal, declaring "that, according to the custom of the island, the lord was not entitled to an indemnity, and also to homme vivant, mourant, et confisquant, to perform and pay the duties and services due to him in respect of the property which had fallen into mortmain."

(1) 1 Moo. P. C. 439.

The principal question is, whether that declaration was correct. There is a subordinate point, with which their Lordships will afterwards deal, as to the manner in which the amount of indemnity was ascertained.

Their Lordships' duty is, not to consider what rule would be most reasonable, but what is the law of Jersey applicable to this case. The law, however, laid down by the judgment appealed from, that the lord has no right to obtain, by decree of the Court, more than a complete indemnity, is not, primâ facie unreasonable.

In the Ancienne Coûtume of Normandy, which is the foundation, on this and other subjects, of the common law of Jersey, the only rule bearing upon this subject was that the lords of whom lands were held should suffer no damage by reason of those lands being, by the act of their vassals, put into mortmain. The manner or measure of indemnity to be given was not defined, and of "homme vivant," &c., nothing was said. It is certain, however, from Terrien's Commentary, that in the practice under the Ancienne Coûtume, the "homme vivant," &c., was not unknown. Terrien says that "the king, and the other high justiciers, and feudal lords" (whether this means all lords, or only the lords of noble fiefs, may possibly be doubtful), "may compel the holders in mortmain to give up possession, and to find a man vivant et mourant, in order that he may perform the services and duties of the fief, in place of the holders in mortmain." It is not to be inferred from this (which cannot mean that both those things were to be done) that the lord, if he availed himself of that right, could claim anything more, even though there might be casualities, such as escheats or fines upon alienation, which would not arise as long as the land was in mortmain under the same title. And what Terrien afterwards says about indemnity (not in the same context, but after a considerable interval occupied by other matter) by no means implies that if the lord claimed indemnity he could also claim "homme vivant et mourant." The mortmain, he there says, "is without prejudice to the interest of the immediate lords, whose consent is necessary, and they, as well as the king, may require their indemnity, which may consist of an annuity or rent payable to the lord, or a sum of money paid down to him." This seems to refer to complete indemnity, the price of the lord's consent that the land should be discharged from his seigneurial rights. But the principle of the "homme vivant et mourant" was that the seigneurial rights should be kept alive by the interposition of a nominal vassal between the holders in mortmain and the lord. If Terrien had understood the law to be that the lord could enforce in this way the specific preservation of his rights, and also obtain indemnity for any diminution in their value, it is at least probable that he would have said so.

It was urged at their Lordships' bar that the 140th article of the Coûtume Réformée of 1585 (which has itself no authority in Jersey) ought to be accepted as evidence of the earlier law, because it was not marked by the revisers as new, and Poingdestre was referred to as saying that it was no more than an explanation of the preceding article (art. 139), "which followed the text of the (old) Coûtumier." Art. 139 did not follow that verbally, though it may have been intended to do so in substance, the Ancienne Coûtume providing only that the lords should "suffer no damage" (ne doivent avoir nul dommage) from the acts of their vassals in putting land into mortmain; the new (art. 139), that "the rights of the lord shall suffer no diminution, in jurisdiction, rents, or other duties." But, when art. 140 is treated as explanatory of the Ancienne Coûtume, it is necessary to inquire what exactly is meant. There was certainly nothing about "homme vivant et mourant" in the Ancienne Coûtume. Not a few commentators of high authority interpreted that article (notwithstanding the conjunction "et") as offering to the lord, not a double, but a single remedy, with a choice between the homme vivant, &c., and a pecuniary indemnity; and Lord Wynford, delivering the judgment of this tribunal in *Thornton* v. *Robin* (1), plainly took the same view, for he not only regarded the "homme vivant," &c., as, when that was the course followed, "the mode of providing the indemnity," but, in his translation of the text of art. 140, he substituted the disjunctive "or" for the conjunctive "et." So understood, the article might, without substantial error, be regarded as expository, not indeed of the text of the Ancienne Coûtume, but of the law and practice under it, agreeably to Terrien's Commentary. But the case is different if it is insisted that art. 140 is to be taken as a positive law, to be strictly construed; and if on the mere text of that article, so interpreted, the doctrine of a double or cumulative remedy is founded. It was on such verbal criticism, supported by the decisions of the Duchy Court in the cases of the Prioress of St. Louis and the Nuns of Briosne, more than seventy years after the publication of the Coûtume Réformée, and the 21st article of the Réglement of 1666, that Basnage, Godefroy, Flaust, and other Norman commentators, founded their dissent from the writers who maintained the opposite view. Even in Normandy the opposite view seems to have prevailed till it was overruled by those decisions, for in the case of the Hospital of Orbec, cited by Flaust, p. 445, the Réglement of 1666 was said to have "*restored* the true maxim, by condemning the mortmain bodies not only to furnish homme vivant mourant et confisquant, but also to pay the indemnity due." Unless it is otherwise shewn that the view of the law established in the cases of the Prioress of St. Louis and the Nuns of Briosne, and by the Réglement of 1666, was accepted in Jersey, that proposition cannot, in their Lordships' judgment, be proved by decisions of 1659 and 1661, or the Réglement of 1666, which had no force of their own in Jersey, or by any verbal criticism of Courts or Commentators upon the text of Article 140 of the Coûtume Réformée, where it differs from that of the Ancienne Coûtume.

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(1) 1 Moo. P. C. 439.

Their Lordships do not think it necessary, for the purposes of this case, to examine another question, on which there seems to have been some diversity of opinion and practice, viz., whether homme vivant et mourant was exigible in any case except that of a noble fief (which that now in question was not), where fealty and homage were due. Ferrière (Dictionary, ed. 1771, tit., "homme vivant et mourant") says that it was not; and Basnage refers to other writers who made the same distinction; which, according to him, was not made in Normandy under the law as settled in 1666. For the purposes of the present case, their

Lordships will assume that no such distinction was known in Jersey.

The Record contains seven precedents of cases which came before the Róyal Court of Jersey between 1830 and 1860; and their Lordships cannot doubt that others would have been added to them, if there had been any others which were equally or more in point. In one only of those seven cases was a judgment at all favourable to the appellants' contention pronounced; and this was by the casting vote of the chief magistrate, an officer of no judicial authority, who only intervenes when (as on that occasion) there is no majority in the Court in favour of any opinion: *Le Breton* v. *Godfray* (1838). That was a case of land acquired by the States of Jersey for public markets; and, after the judgment, from which the States had leave given them to appeal to a Greater Number, it was compromised, upon the terms of a reference to experts, "to value the entire indemnity to which the lord had right for the loss of all his rights, including homme vivant mourant et confisquant." In another case, of land acquired for a Wesleyan chapel, an agreement of the parties (made an act of Court without any judgment), was for the payment of an annual rent to the lord, "tant pour l'indemnité, que pour être affranchis de l'homme vivant mourant et confisquant": *Dart* v. *Godfray* (1856). In three other cases, *Thornton* v. *Robin* (1), *Le Breton* v. *Godfray* (1837), and *Baudains* v. *Perchard* (1855–56), indemnity only, at the rate of 4 per cent., was given, without homme vivant, &c. These three cases were distinguished, on the ground that the Crown, and public authorities who had taken land compulsorily under statutory powers, could not be required either to give up possession, or to provide homme vivant, &c. Their Lordships do not inquire whether that distinction is satisfactory; but there was, at least, nothing said or done in any of those cases which could assist the appellants' argument. The two remaining decisions, in *Constable of St. Heliers* v. *Godfray* (1856), and *Filleul* v. *Godfray* (1855–58), are distinctly against the appellants. The judgment in both of them was the same. The holders in mortmain were condemned "to give up possession, or give the lord homme vivant mourant et confisquant, and pay him an indemnity of 2 per cent. on the actual value of the property," within a limited time; "or, if they failed to do this, to pay him an indemnity of 4 per cent. on the actual value of the property, for the relinquishment of all his rights." The choice was, in effect, given them, either to provide homme vivant, &c., and pay half the usual indemnity, or to pay the full indemnity of 4 per cent. without homme vivant, &c.; the operative part of the decree being only for the full indemnity, if the other alternative were not preferred.

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(1) Affirmed by Her Majesty in Council, 1 Moo. P. C. 439.

These decisions of the Courts are not the only evidence of the law and practice of Jersey upon the subject. The statutory enactment of 1862 may, in their Lordships' opinion, properly be referred to; because a statute of so wide a scope, treating a fixed pecuniary indemnity as the full measure of the lord's right when use was made of the facilities which that Act afforded for bringing land into mortmain, may be presumed, not arbitrarily to innovate upon, but to follow and give effect to, the principles of compensation already known to the law. It was an Act which enabled all kinds of real property in the island to be brought into mortmain, upon application to the Royal Court, "for any purpose of public utility; for the use and profit of commercial and industrial associations; for the uses of the Church of England or of other religious bodies; or for the establishment of schools and educational institutions and other philanthropic purposes." The Attorney-General (before whom the papers in every such case were to be laid) was to state in open court "his opinion on any objections which he might find to the purposes of the trust, or to the form or effects of the deed"; but there was no provision for giving notice, in any case, to the lord of any seigneurie of which the land might be held, or for giving him any locus standi to oppose the application. The lands brought into mortmain under that Act were to be "for ever discharged from all seigneurial rights, duties, and services" (other than rents), "except *the indemnity due* to the lord of the fief"; the rate of indemnity, payable under the Act to the Queen and every other lord, being fixed at "4 per cent. upon bare lands, and 3 per cent. upon houses, on the purchase price or on the value of the realty to be freed." Provision was made for ascertaining the value by experts, if the lord should not be satisfied with the purchase price, and the parties were to pass a hereditary contract before the Court declaring the land (whether taken at the purchase price, or as re-valued by experts) "freed for ever from the seigneurial rights, dues, and services." And it was further provided, that "the seigneurial rights, dues, and services, when once extinguished by the operation of this law, cannot under any circumstances revive; the rent assigned or payable for their extinction being deemed to represent, as regards the interested parties, the fair value of the said rights, dues, and services."

If, therefore, the property now in question had been brought into mortmain under that law (which it was not), no homme vivant, &c., could have been claimed; and when the indemnity, according to the prescribed rate, was paid, the land would have been for ever, and to all intents and purposes, enfranchised. The rate of 4 per cent. was, beyond question, the maximum rate of indemnity known to the law of Jersey (independently of the Act of 1862) in cases of this kind.

The statute speaks of "the" indemnity, as if it were a well-known thing, and an equivalent for the extinction of seigneurial rights. Its framers must have had before their minds some definite view of the nature and extent of those rights, and it is difficult to suppose that their view could have been any other, than that the lord was not entitled both to an indemnity and to the preservation of his rights or some of them in specie.

In this state of authority their Lordships are satisfied that the declaration in the decree of the Superior Number of the 8th of October, 1891, was right.

There remains the subordinate question, as to the mode in which the amount of the indemnity due was ascertained in this case.

The property acquired by the States for the fever hospital consisted of houses, with gardens attached to them; the purchase-money paid by them for that property was £1200. They offered £36, or 3 per cent. on that purchase-money, before the case came into Court; but this was refused. The claim of the

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Crown was to 4 per cent. of the purchase-money, without re-valuation. The Court referred it to experts to settle the amount of the indemnity, for so long as the land should remain in mortmain, without fixing either 3 or 4 per cent. on the value, as the rate to be paid. It would have been more satisfactory if the Court had fixed the rate, and had only referred it to experts to find the true value of the property (which might be more, or less, than £1200), as was done in some of the precedents. But, on the other hand, the form of reference was the same as in *Thornton* v. *Robin* (affirmed here), and *Le Breton* v. *Godfray* (1838); in both which cases the Court was silent as to the ad valorem rate. Under these circumstances, the amount in controversy being only £12, and the appellants having failed to shew any substantial miscarriage of justice, their Lordships think, that it would not be right to disturb the judgments of the Courts below upon a point of form only; though they may express their hope that what they think the better of two courses, for each of which precedents exist, may be hereafter followed in similar cases. The experts awarded £36, which may have been arrived at by taking 3 per cent. on the purchase money; and their Lordships are not satisfied that this would have been wrong, having regard to the distinction made by the law of 1862; though the case is not directly governed by that law. If, as the appellants say they believe the experts reduced the value of the property to £300 less than the purchase-money, and gave 4 per cent. on £900, this (so far as the rate was concerned) would be in accordance with the appellants' own contention; and their Lordships, upon the materials before them, could not say that such a re-valuation was wrong. It must have been in the power of the Court, if properly called upon, to ascertain, through the Vicomte, what the experts actually did, and to correct it if wrong; but it does not appear that either party thought this necessary. On the whole, their Lordships will advise Her Majesty to dismiss this appeal; but they do not think the case one for costs.

Solicitor for appellants: *Solicitor for the Treasury.*

Solicitors for respondent: *Saunders, Hawksford, Bennett & Co.*

[PRIVY COUNCIL.]

ASHBURY . . . . DEFENDANT;

AND

ELLIS . . . . PLAINTIFF.

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April 21, 24;
June 17.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Law of New Zealand—15 & 16 Vict. c. 72—Powers of Local Legislature—Proceedings against Absentees without Service.

Held, that 15 & 16 Vict. c. 72, on its true construction, empowers the legislature of New Zealand to subject to its tribunals persons who are neither by themselves nor their agents present in the colony:—

Held, further, that a law of the local legislature authorizing the local Courts in any case of contracts made or to be performed in the colony to decide whether they will or not proceed in the absence of the defendant is intrà vires and reasonable.

Whether a judgment against an absentee without service of the writ will be enforced by the Courts of another country is a matter for those Courts to determine, and does not affect the validity of the local law.

APPEAL from an order of the Court of Appeal (Nov. 16, 1891), affirming an order of Williams, J. (June 23, 1891), in the Supreme Court (Otago and Southland District), in the matter of two actions brought in the Supreme Court by the respondent against the appellant, upon promissory notes for £5435, purporting to have been made by the appellant through his agent Zimmer. In these actions the respondent obtained leave to issue writs and proceed thereon without service against the appellant under rule 53 of the Civil Procedure Court (46 Vict. No. 22, 2nd schedule). The appellant applied to the Supreme Court to rescind that leave which both Courts, as mentioned above, refused to do.

The appellant was domiciled in England. He was not at the time the actions were commenced present either in person or by agent in the colony, and had not been there since December, 1886, when he was there on a short visit, and never had a permanent residence there. At the time the writs were issued he was resident in London. The facts are stated in the judgment of their Lordships.

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and the HON. GEORGE DENMAN.

Sir *Horace Davey*, Q.C., *Piggott*, and *Worsfold*, for the appellant, contended that the orders should be reversed, and the writs set aside with costs. The questions are, first, whether rule 53 has been rightly construed; second, whether, if that construction be right, the rule is not pro tanto ultrà vires the local legislature under the constitution of the colony; third, whether the Court exercised a right discretion in making the orders. It was contended that rule 53 of the Code of Civil Procedure (46 Vict. No. 29, 2nd schedule) applies only to those defendants over whom the Supreme Court has properly jurisdiction, and that the appellant was not such a person. Rules 48–51 applied to his case. If rule 53 applies to all defendants who are absent from the colony in the action specified therein, so that the appellant's case would fall within it, then the rule itself was to that extent beyond the powers of the legislature; for that legislature has no power except over its own subjects. Reference was made to 15 & 16 Vict. c. 72, the Act which created the legislature of New Zealand. The appellant not being subject to its authority by birth, and not being resident either by himself or his agent within its jurisdiction, and never having been either domiciled or resident in New Zealand, could not be subjected by it in his absence to its tribunals; and moreover foreign Courts would not recognise judgments so obtained or proceed to enforce them. Reference was made to *Buchanan* v. *Rucker* (1); *Macleod* v. *Attorney-General for New South Wales* (2); *Russell* v. *Cambefort* (3); *Schibsby* v. *Westenholz.* (4) With regard to the erroneous exercise of discretion, it was contended that an action was proceeding between the same parties in the English Courts in respect of certain other promissory notes, part of the same transaction, in which the issues to be determined are the same.

Finlay, Q.C., and *Reginald Brown*, for the respondent, were not heard.

(1) 9 East, 192.
(2) [1891] A. C. 455.
(3) 23 Q. B. D. 526.
(4) Law Rep. 6 Q. B. 155.

1893. June 17. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The main question argued in this case relates to the right of the New Zealand Legislature to authorize judicial proceedings against absentees. The rule of the New Zealand Code (46 Vict. No. 29) which has come under discussion is rule 53, one of a group of rules which fall under the head of "Proceeding without service." The material part of it is as follows:—

"In actions founded on any contract made or entered into or wholly or in part to be performed within the colony, on proof that any defendant is absent from the colony at the time of the issuing of the writ, and that he is likely to continue absent, and that he has no attorney or agent in the colony known to the plaintiff who will accept service, the Court may give leave to the plaintiff to issue a writ and proceed thereon without service."

Then come a number of provisions relating to the conditions on which leave should be given, and to its incidents when given.

Another group of rules in the same code relates to service of process out of the colony. There seems to have been considerable discussion in the Courts below whether Williams, J., who presided in the First Court, should have acted under the last-named set of rules rather than the first. But independently of the fact that, if there is jurisdiction, the matter is one of judicial discretion and not one arising on this appeal, the contention of the appellant is equally hostile to the validity of both groups of rules.

His broad contention is, that the Act of Parliament (15 & 16 Vict. c. 72) which gives to the legislature of New Zealand power "to make Laws for the Peace, Order, and good Government of New Zealand, provided that no such Laws be repugnant to the Laws of England," does not give it power to subject to its judicial tribunals persons who neither by themselves nor by agents are present in the colony. It is not contended that the rules in question are repugnant to the laws of England. In fact, they are framed on principles adopted in England. But it is said that the moment an attempt is made by New Zealand law to affect persons out of New Zealand, that moment the local limitations of the jurisdiction are exceeded, and the attempt is nugatory. This was put at the bar in so broad and abstract a way, that it might be sufficient for their Lordships to answer it by equally abstract propositions. But it will be more satisfactory to state the material facts which have raised the question.

The appellant, Mr. Ashbury, resides in England. In the year 1885 he went to New Zealand, and there, on the 23rd of March of that year, made a written agreement with John Chute Ellis, the respondent's brother, for the purchase of a large tract of land. After answering mortgages, the surplus purchase-money, £38,440, was secured, as regards principal by twelve promissory notes payable in England, and as regards interest by twelve promissory notes payable at the Bank of Australasia, in Invercargill, New Zealand. The latest notes are payable on the 20th of December, 1890. Some crops and stock were to be taken by Ashbury at valuations, and it is a term of the agreement that if, on the completion of the valuations, it is found that the balance of the purchase-money is not correctly represented by the promissory notes, new ones shall be given.

In November, 1886, Ashbury was again in New Zealand. On the 4th of that month he addressed a letter to the Bank of Australasia, requesting them to treat his agent, John Jerome Zimmer, as empowered to draw, accept, and indorse in his name bills of exchange and promissory notes. On the 26th of the same month he executed a deed appointing Zimmer his attorney for (amongst other things) managing his estates in New Zealand, and adjusting all accounts depending between him and any person whomsoever. Ashbury then left New Zealand, and has never been there again.

About this time Zimmer settled the valuations which were still pending between Ashbury and John Chute Ellis under the agreement of March, 1885. He paid a portion of the amount found due, and the rest he secured by nine promissory notes purporting to make Ashbury liable to pay to John Chute Ellis, at the Bank of Australasia, Invercargill, various sums at various dates, the latest of which is the 20th of December, 1890. Two

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of the notes bear date the 17th of September, 1886, and the other seven the 20th of September, 1886. Ashbury states that they were in fact given in February, 1887. They were paid into the bank by John Chute Ellis, and Thomas Chute Ellis claims to be indorsee of them for value. They are the notes now sued on in two actions. It seems that before any action was brought, Ashbury revoked Zimmer's agency, and remained without any agent in the Colony.

In the earlier of the actions, founded on three of the notes, an order was made on the 18th of February, 1891, allowing the plaintiff, Thomas Chute Ellis, to proceed under rule 53 without service. In June the defendant Ashbury moved to rescind the order, or, in the alternative, for leave to file a defence, and for postponement of the trial pending an application by him to take his evidence by commission in England. On the 23rd of June, 1891, Williams, J., refused the first part of the defendant's motion and granted the second. Precisely similar proceedings took place in the second action.

The defendant then moved the Court of Appeal to discharge the original orders giving the plaintiff leave to proceed without service, and to discharge the orders of the 23rd of June so far as they maintained the original orders. It was agreed that the arguments and judgment should apply to both actions. On the 19th of October, 1891, the Court dismissed the appeals with costs. From that decision the defendant obtained special leave to appeal to Her Majesty in Council.

So far as the decision turns on the precise nature of the case, it is not a very favourable case for denying the right of the New Zealand authorities to try the questions at issue between these parties. Zimmer, being certainly Ashbury's agent in New Zealand for some purposes, makes a contract purporting to bind his principal to the payment of money in New Zealand. This contract is itself the sequel of another contract by Ashbury for the purchase of land in New Zealand. Ashbury defends himself by contending that Zimmer held no agency empowering him to give the notes, and by alleging that he is in a position to rescind his earlier contract with John Chute Ellis; that he is suing in England for that purpose; that he will have counter-claims to enforce against John Chute Ellis larger than the amount of the notes sued on; and that the notes were indorsed to Thomas Chute Ellis under circumstances disentitling him to stand in any better position than John Chute Ellis. These defences may or may not be made good. They are the matters to be tried in these actions. Whether they can be better tried in England or in New Zealand we need not discuss. It is obvious that they concern rights that have accrued, and acts that have taken place, in New Zealand.

If the New Zealand Legislature had enacted that, in a concrete case such as the present one, the New Zealand Courts should have power to give the plaintiff a decree notwithstanding that the defendant held himself aloof, we should hardly have heard the suggestion that such a law was not one for the peace, order, and good government of New Zealand. Of course they have framed their law in more abstract and flexible terms. But, taking those terms, their Lordships are clear that it is for the peace, order, and good government of New Zealand that the Courts of New Zealand should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether they will or will not proceed in the absence of the Defendant. The power is a highly reasonable one. So far as regards service of process on persons not within their local jurisdiction, or substituted service, or notice in lieu thereof, in proper cases the English Courts have it conferred on them by the Imperial Parliament. The New Zealand Legislature, it is true, has only a limited authority; but in passing the rules under discussion, it has been careful to keep within its limits.

But it was said that a judgment so obtained could not be enforced beyond the limits of New Zealand; and several cases of suits founded on foreign judgments were cited. Their Lordships only refer to this argument to say that it is not relevant to the present issue. When a judgment of any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country with regard to all the circumstances of the case. For trying the validity of the New Zealand laws it is sufficient to say that the peace, order, and good government of

New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand.

The only other contention related to the word "absent" in rule 53. The appellant seeks to confine it to persons who at some previous time have been domiciled or resident in New Zealand. It is not easy to appreciate the reasons why such an artificial sense should be put upon the word; and during the argument their Lordships expressed agreement with the judges of the Court of Appeal, who held that the word is used in its ordinary sense, and describes persons who are not in New Zealand. The result is that, in their Lordships' judgment, this appeal should be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Solicitors for appellant: *Michael Abrahams, Sons & Co.*
Solicitors for respondent: *Linklater & Co.*

[PRIVY COUNCIL.]

J. C.*

1893

May 13.

Ex parte MACREA.

FROM THE HIGH COURT FOR THE NORTH WESTERN PROVINCES, ALLAHABAD.

Practice—Leave to Appeal in Criminal Case refused—Indian Penal Code, s. 511.

> Although in very special and exceptional circumstances leave to appeal in criminal cases may be granted, misdirection by a judge, either in leaving a case to a jury where there is no evidence or founded on an incorrect construction of the Penal Code, even if established, is insufficient for that purpose, especially where no miscarriage of justice has resulted.

THIS was a petition for special leave to appeal from a conviction by the High Court, dated the 13th of June, 1892, under sects. 511 and 420 of the Penal Code.

It stated that the petitioner had been convicted of (1.) an attempt to cheat and thereby fraudulently to induce the Comptroller-General to deliver to him or to Asad Ali a Government promissory note, No. 9764, for Rs.500, and pay the accrued interest thereon; (2.) conspiracy with Asad Ali with that object; (3.) abetment of an attempt by Asad Ali; and had been sentenced to two years' rigorous imprisonment.

An application had been made on the 1st of December, 1892, under sect. 32 of the High Court Charter of 1866, that the petitioner's case might be declared a fit and proper one for appeal to Her Majesty on the ground that the jury had been misdirected to the effect that the acts covered by the evidence amounted to an attempt at cheating within the meaning of the Penal Code, and had been refused.

The charge related to a lost Government promissory note for Rs.500, No. 9764, with arrears of interest thereon from 1865, which belonged to the representatives of one Mirza Husain Ali, and was to the effect that the petitioner had attempted to cheat by applying in writing to the Comptroller-General on the 17th of June, 1891, and doing other acts between the 17th of June and the 20th of October, 1891, at Lucknow, to deceive him into the belief that the same belonged to Husain Ali deceased (brother of Asad Ali), and thereby dishonestly inducing the Comptroller-General to pay him or Asad Ali the accrued interest, and deliver to one or other a duplicate of the said note.

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

The petition stated that no evidence was laid before the jury that an application had ever been made by or on behalf of the petitioner either orally or in writing to the Comptroller-General that the arrears of interest should be paid, or the duplicate note delivered, or that any initial steps should be taken in the Public Debt Office towards such payment or issue; that on the contrary a witness who had been at the time superintendent of that office deposed that no communication had been received from the petitioner on which such payment or issue could have been made. It also stated that the evidence adduced was directed to prove the said false representation to the Comptroller-General, and that inquiries had been made by the petitioner at the Public Debt Office whether the said note was outstanding or not, and that the petitioner had caused letters of administration to Husain Ali deceased to be issued reciting that note No. 9764 belonged to his estate, that he requested the police authorities to investigate the alleged loss, and produced to them a copy of the lost note, and also sent such copy, together with a copy of the letters of administration, to the *Exchange Gazette* for publication.

Knox, J., who presided at the trial, directed the jury that, besides being satisfied of the petitioner's intention to cheat, they must be satisfied that he had done acts towards such cheating sufficiently important for the law to take notice of, and sufficiently near to the act of cheating intended and contemplated, and that upon the question of proximity they must consider whether those acts were sufficient to excite reasonable apprehension that the act attempted would be carried out and accomplished with the intention to cheat.

In refusing the petitioner's application for leave to appeal, Knox, J., stated that "there appears to be a wide difference between the meaning of the word 'attempt' as understood by English lawyers in the phrase 'attempt to commit a felony' and the word 'attempt' as actually defined in the Indian Penal Code." Blair, J., agreed that sect. 511 uses the word "attempt" in a very large sense, and held that the petitioner's acts bore and were intended to bear upon the mind of another person, that that mind was left to operate, that consequently acts were done towards deceiving in a case where deception would operate as an inducement to deliver within the meaning of the Code, and amounted to an attempt, "even though a further act of deception did not follow, which might probably have been required to complete the offence of attempt within the meaning of English law."

Cowell, and *Bodkin*, in support of the petition, submitted that leave should be granted, on the ground that substantial and grave injustice had been done. There had been misdirection founded on an entirely erroneous construction of sect. 511, which led to a conviction, in the complete absence of any evidence to the effect that there had been an attempt to cheat. Unless the judge had withdrawn that part of the case from the jury, they should have been instructed to consider whether there was any act on the part of the petitioner which began the execution of an intention to cheat. The Penal Code does not render him punishable under sects. 511 and 420 for acts which merely tend towards such beginning, or which shew that, unless interrupted, he may possibly begin such execution. There is a broad distinction recognised by the Code between preparation and attempts: see sects. 399, 393, 402 as to the former, and sects. 307 (*c*) and (*d*) as to the latter. Even if the Penal Code uses the word "attempt" in sect. 511 in any different sense from that applied to it by English law, still it was not intended by the Code to obliterate the distinction between acts which amount to preparation for and acts which begin the execution of an offence. Here the evidence shewed that the petitioner had not performed a single act which rendered it possible for the Comptroller-General to deliver up any property in his control. No application had been made to that effect; and if it had been made, many other acts would have to follow before the offence could have been completed. Attempt was not made till at least there had been an application, for before the act of applying completion of the offence was totally impossible. Other High Courts have not taken this entirely novel view of the word "attempt": see *Queen Empress* v. *Riasut Ali* (1); *In re Cassidy* (2); *Queen Empress* v. *Dhundi* (3). As to the English view of "attempt," see *Eagleton's Case* (4), and *Reg.* v. *Cheeseman* (5). As this erroneous construction, creating a new offence unknown to the Code, has been affirmed by the Bench which refused leave to appeal, and as sect. 511 applies to nearly every offence created by the Penal Code, the petitioner's case is one of general importance, and excepted from the stringent rule which prevents criminal appeals. Reference was made to *In re Dillett* (6); *Macleod* v. *Attorney-General for New South Wales* (7); *Reg.* v. *Bertrand* (8).

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

Their Lordships are of opinion that leave to appeal ought not to be granted in this case.

The ground upon which leave is asked is that the petitioner, being indicted under the 511th section of the Indian Penal Code for an attempt to cheat, there was no evidence of an attempt to cheat, but only of preparation for such an attempt.

Sect. 511 provides that "whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence" shall be punished in the manner therein directed.

The facts are that the petitioner had obtained, with a fraudulent intent, as must be taken to be the fact after the finding of the jury, letters of administration to be granted, which recited that a certain lost Government promissory note was the property of one Asad Ali, and that further he had with fraudulent intent sent those letters of administration to the Public Debt Office as the foundation for an application for payment of the money.

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(1) Ind. L. R. 7 Calc. 352.
(2) 4 Bomb. H. C. Cr. 17.
(3) Ind. L. R. 8 Allah. 304.
(4) Dearsley, 538.
(5) Leigh & Cave, 140.
(6) 12 App. Cas. 459.
(7) [1891] A. C. 455.
(8) 4 Moore's P. C. (N.S.) 474, 475.

The learned judge who tried the case laid down in his charge to the jury that in order to convict the prisoner they must be satisfied, not only that he intended to cheat, but that he had done an act towards that cheating, and the learned judge clearly had in view the distinction between preparation to commit an offence and acts done towards the commission of the offence.

The jury found the petitioner guilty. Their Lordships see no reason to believe that there was any misdirection on the part of the learned judge, or that there has been a miscarriage of justice. But they do not desire to dispose of the petition simply upon that ground. If there be any foundation for this application, it rests upon this—that the learned judge did not in his charge to the jury correctly construe the 511th section of the Penal Code, or that he left the case to the jury when there was no evidence to go to the jury. In their Lordships' opinion, if they were to sanction an appeal in the present case, it would be very difficult to refuse leave to appeal in all cases in which it could be established that there had been a misdirection by the judge who tried the case. There are, no doubt, very special and exceptional circumstances in which leave to appeal is granted in criminal cases; but it would be contrary to the practice of this Board, and very mischievous, if any countenance were given to the view that an appeal would be allowed in every case in which it could be shewn that the learned judge had misdirected the jury.

Solicitors for petitioner: *Ranken Ford, Ford, & Chester.*

[HOUSE OF LORDS.]

GLYNN AND OTHERS . . . . APPELLANTS;

AND

MARGETSON & CO. AND OTHERS . . . . RESPONDENTS.

H. L. (E.)
1893
May 1.

Ship—Bill of Lading, Construction of—Deviation Clause—Printed Words—Liberty to deviate from Specified Voyage—Extent of Deviation Authorized.

Oranges were shipped on board a steamship under a bill of lading which stated that the ship was then "lying in the port of Malaga, and bound for Liverpool, with liberty to proceed to and stay at any port or ports in any station in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever." The bill of lading contained a clause whereby the shipper expressly agreed to all its stipulations whether written or printed. The deviation clause was printed with the name of the port of shipment left blank and filled up in writing.

The ship left Malaga for a port on the east coast of Spain and out of her course for Liverpool, then returned and made for Liverpool, where the oranges were delivered in a damaged condition owing to the delay. In an action by the shipper against the shipowner for damages for breach of contract:—

Held, affirming the decision of the Court of Appeal ([1892] 1 Q. B. 337), that the printed clause must not be construed so as to defeat the main object and intent of the contract, which was to carry the oranges from Malaga to Liverpool; that the liberty must be restricted to ports which were in the course of the voyage; that the deviation in question was therefore not justified, and that the shipowner was liable.

APPEAL from an order of the Court of Appeal (1).

Oranges were shipped on board the steamship *Zena* under a bill of lading stating that the *Zena* was "now lying in the port of Malaga, and bound for Liverpool, with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever." The last clause of the bill of lading ran thus:—"Notice.—In accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed." The *Zena* left Malaga for Burriana, a port about 350 miles from Malaga on the east coast of Spain, took in cargo, retraced her course to Valencia and thence to Liverpool, thus occupying more days in reaching Liverpool than if she had proceeded there direct from Malaga. Owing to the delay the oranges arrived in a damaged condition. The respondents, who were the consignees, having brought an action for damages for breach of contract against the appellants, the owners of the *Zena*, the defence was that the deviation was justified by the bill of lading. Hawkins J., who tried the action with a special jury, held that the deviation was not justified and gave judgment for the plaintiffs for £589, and this decision was affirmed by the Court of Appeal (Lord Esher M.R., Bowen and Fry L.JJ.) (1).

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(1) [1892] 1 Q. B. 337.

April 28, May 1. *Bigham* Q.C. and *H. F. Boyd* (*W. S. Glynn* with them) for the appellants :—

The Courts below have introduced a qualification into the bill of lading for which there is no justification. The words of the bill of lading must be taken in their natural sense. They were intended to give the shipowner a discretion, and it is convenient for shippers that the owner should have this discretion, because it reduces freight. This is a common form of bill of lading, well known in the trade and familiar to all the appellants' customers. The clause is intended, among other purposes, to meet the case of stress of weather. If the Court of Appeal is right, all the steamers trading in the Mediterranean are deviating from their bills of lading. The same question has arisen in cases of marine insurance. In *Leathly* v. *Hunter* (2), *Grant* v. *Paxton* (3), *Metcalfe* v. *Parry* (4), the principle has been applied for which the appellants contend. Every word of the bill of lading ought to receive its grammatical meaning. The Court of Appeal relied on *Leduc* v. *Ward* (5), in which Lord

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(1) [1892] 1 Q. B. 337.

(2) 7 Bing. 517.

(3) 1 Taunt. 463.

(4) 4 Camp. 123.

(5) 20 Q. B. D. 475.

Esher M.R. speaking of a bill of lading in which liberty was given to call at any ports in any order, and a ship bound from Fiume for Dunkirk called at Glasgow, said (p. 481): "Business could not be carried on upon those terms." The answer is that it has been so carried on for many years. All that is meant by the ship's being "bound" for Liverpool is that Liverpool is the ultimate destination. It does not preclude the vessel from calling at intermediate ports. *Leduc* v. *Ward* (1) is distinguishable, and the terms there were not so wide. The construction adopted by the Court of Appeal gives no meaning to the words. It ignores the actual contract and makes a new contract for the parties which they might have made for themselves but did not.

Joseph Walton Q.C., *C. C. Scott*, and *Cecil Carver*, for the respondents, were not heard.

LORD HERSCHELL L.C.:—

My Lords, the question raised by this appeal is the construction to be put upon a bill of lading by which the shipowners agreed to carry certain goods of the respondents. The shipowners, who are the appellants, alleged that the Court below erred in so construing their liability under the bill of lading as to hold that they had broken their contract by proceeding to a port called Burriana after they had taken on board the cargo shipped by the respondents.

A cargo of oranges was shipped at Malaga, and the bill of lading is in these terms: "Shipped in good order and condition" "in and upon the good steamship called the *Zena*, now lying in the port of Malaga, and bound for Liverpool. Eight third cases oranges." The port to which the vessel proceeded after she left Malaga was not in the direction of Liverpool, but in the contrary direction, taking the vessel farther away from Liverpool than she was at Malaga.

Of course it could not be disputed that, if the words which I have read to your Lordships were the only words to be found in the bill of lading relating to the voyage, the shipowner could not justify his act in thus deviating from the stipulated voyage and would be liable to the shipper in respect of any damage to his goods sustained in consequence of such deviation. In the present case, owing to the delay which took place before the vessel arrived at Liverpool, the oranges were much damaged, and loss was consequently sustained. But the shipowner seeks to justify the act of proceeding to Burriana by reason of the words which follow those which I have read, "with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever." The contention of the appellants is, that under those words the voyage to Burriana was justified by the terms of the contract between the parties.

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(1) 20 Q. B. D. 475.

My Lords, it is admitted that the contention of the appellants goes this length, that after the oranges were taken on board at Malaga upon a vessel said to be bound for Liverpool, the ship might have been sent to any port within the limits named, or any number of those ports in any order, staying there any time she pleased, for the purpose of taking in cargo or delivering it at any of those ports. And it is true that if their full and complete meaning be given to the words used, that will be the consequence of giving them that meaning. The question is whether they ought to be so construed, or whether there is any reason for putting a restriction upon them.

These words are printed words in a document evidently intended to be used in relation to a variety of contracts of affreightment. The name of the particular port of shipment, as well as the goods to be shipped, is left in blank, and the words in question are treated as a liberty which is to attach to the particular voyage which is agreed upon between the parties. But the main object and intent of the charterparty is the voyage so agreed upon; and although it would not be legitimate to discard the printed words (indeed here the shipowner requires the shipper to undertake to be bound by them as well as by the written words), yet it is well recognised that in construing an instrument of this sort, in considering what is its main intent and object, and what the interpretation of words connected with that main intent and object ought to be, it is legitimate to bear in mind that a portion of the contract is on a printed form applicable to many voyages, and is not specially agreed upon in relation to the particular voyage.

My Lords, the main object and intent, as I have said, of this charterparty is the carriage of oranges from Malaga to Liverpool. That is the matter with which the shipper is concerned; and it seems to me that it would be to defeat what is the manifest object and intention of such a contract to hold that it was entered into with a power to the shipowner to proceed anywhere that he pleased, to trade in any manner that he pleased, and to arrive at the port at which the oranges were to be delivered when he pleased.

Then is there any rule of law which compels the construction contended for? I think there is not. Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent. Therefore, it seems to me that the construction contended for would be an unreasonable one, and there is no difficulty in construing this clause to apply to a liberty in the performance of the stipulated voyage to call at a particular port or ports in the course of the voyage. That port or those ports would differ according to what the stipulated voyage was, inasmuch as at the time when this document was framed the parties who framed it did not know what the particular voyage would be, and intended it to be equally used whatever that voyage is. The ports a visit to which would be justified under this contract would, no doubt, differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must, in my view, be a liberty consistent with the main object of the contract—a liberty only to proceed to and stay at the ports which are in the course of the voyage. In saying that I am, of course, speaking in a business sense. It may be said that no port is directly in the course of the voyage (indeed that was argued by the learned counsel for the appellants), inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given.

Then it is said that this may be done "in any rotation." I do not think that that carries the matter any further. When once the conclusion which I have indicated is arrived at, if the meaning to be given to those words is that the vessel may take those ports in any order she pleases in a reasonable sense, nevertheless the ports referred to must still, in my opinion, be ports lying between Malaga and the port of destination, Liverpool, even although there might be a justification for her not touching at any particular one of those ports, or more than one of them, in the exact order in which they would come in the voyage between those two places. It is not necessary to decide what effect should be given to those words "in any rotation"; but even giving to them the fullest possible effect they do not seem to me to enlarge the number of ports at which it would be justifiable for this vessel to touch during the course of her voyage.

My Lords, it is to be observed that the liberty which is given is not a liberty simpliciter to proceed to those ports. Purposes are mentioned; and the first which is mentioned is "for the purpose of delivering coals, cargo or passengers." That clause seems to me to throw light upon the construction which ought to be put upon the language used in the other part of the instrument, because the delivering of coals, cargo or passengers points to the carrying out of a voyage already determined upon in relation to a cargo already on board. I do not put that before your Lordships as by any means the governing consideration, because I am led to the conclusion at which I have arrived upon the same grounds as those which have been so very clearly and fully expressed by the learned judges in the Court below. I find myself so completely in agreement with the reasons which they have given that I do not think it necessary to trouble your Lordships with any further observation.

I move your Lordships that this appeal be dismissed with costs.

H. L. (E.)
1893
GLYNN
v.
MARGETSON &
Co.

LORD HALSBURY L.C. :—

My Lords, I am entirely of the same opinion. It seems to me that in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole of the instrument and not at one part of it only. Looking at the whole of the instrument, and seeing what one must regard, for a reason which I will give in a moment, as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract. The main purpose of the contract was to take on board at one port and to deliver at another port a perishable cargo. I do not think the learned counsel who argued this case on the part of the appellants gave sufficient effect in the argument which he addressed to your Lordships to the difference between the ordinary and formal parts of the document which are to be found in print and the written parts—indeed I gathered from him at one time that he rather contested the legitimacy of considering the difference whether the words were in print or in writing; he appeared to intimate that that doubt was justified by the terms of this particular document, because that in the ordinary construction of a commercial document such a principle as I have mentioned has been adopted certainly for something like a century cannot be a matter of doubt, and the reason for it appears to me to be very cogent and relevant to the case before your Lordships.

I have in my hand the report of a case in the Court of King's Bench in the year 1803, *Robertson and Another* v. *French* (1), in which Lord Ellenborough, as it appears to me, gives with great precision the ground upon which one part of a document may be relied upon as controlling and cutting down the generality of the words in the other. His Lordship says: "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases. It is therefore proper to state upon this head that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz. that it is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is that the greater part of the printed language of them being invariable and uniform has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formality adapted equally to their case and that of all other contracting parties upon similar occasions and subjects."

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(1) 4 East, at p. 135.

Now if one applies the principle of what Lord Ellenborough there says to the present case, in which the parties have in writing expressed the intention that there should be a delivery of goods (and the particular class of goods is not to be omitted from consideration—they were perishable goods taken from one port to another) it seems to me that to apply these general printed words (which might in a particular case receive complete fulfilment) as regards each of these stipulations, to the particular contract as between carrier and customer would manifestly defeat the very object which both the parties had in view.

My Lords, I also concur with my noble and learned friend on the woolsack that the particular words which give the liberty are to be construed to refer to a liberty to deliver in the course of a voyage which has been agreed upon between the parties.

Under these circumstances I do not desire to add anything except to point out that Mr. Bigham's argument, lucid and able as it was, did somewhat of injustice to Bowen L.J.'s observation when he said that Bowen L.J. had assumed something when he stated that it would make it impossible to insure the cargo if such a construction was adopted as was then insisted upon. "It would make it impossible," says Bowen L.J. "to insure the cargo. It would make it impossible for the consignees of the cargo to know what to do as to taking delivery and to know what they were to do with the bills of lading." My Lords, it seems to me that that which the learned counsel attributed to Bowen L.J. he has been guilty of himself. If he assumes that the construction is that which he contends for, his answer that nevertheless business does go on would be good enough; but he seems to forget that the question which we are considering is whether that is the construction; because he must not first assume that that is the true construction, and that business does go on nevertheless, which was his answer, but he must consider whether mercantile men when they do business in this form do not recollect that a business sense will be given to business documents, and that therefore they are not under the peril of leaving it absolutely to the shipowner himself to do what he will with the cargo. Indeed the argument seems to me to assume this, that you might get rid of written documents altogether, inasmuch as both carrier and customer have such complete confidence in each other that however wide and unreasonable may be the construction attributed to a written instrument between carrier and customer they are not likely to disagree. My Lords, if that is the argument I am afraid that the records both of your Lordships' House and of all other Courts do not favour that view. Undoubtedly both carrier and customer differ very widely sometimes as regards what is reasonable and what is not, and for that reason they call upon Courts of Law to construe sometimes somewhat loose and irregular instruments.

My Lords, for these reasons I agree in the motion which my noble and learned friend on the woolsack has made.

LORD MACNAGHTEN :—

My Lords, I agree.

LORD SHAND :—

My Lords, I am also of the same opinion.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 1st May 1893.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents : *Snow, Snow, & Fox.*

[HOUSE OF LORDS.]

H. L. (E.)
1893
June 2.

JOHN EDWARDS AND HENRY ISAACS . APPELLANTS;

AND

ROBERT BRUDENELL CARTER, THE EARL OF LISBURNE, AND OTHERS . RESPONDENTS.

Infant—Marriage Settlement—Contract Voidable not Void—Agreement to Settle after-acquired Property—Repudiation Five Years after attaining Majority —Reasonable Time—Infants' Relief Act 1874 (37 & 38 *Vict. c.* 62) s. 2.

By a marriage settlement the father of the intended husband (then a minor) covenanted with the trustees to pay them an annuity during the life of the intended wife or of any child or grandchild of the marriage, and the trustees were to pay the annuity to the husband during his life or until his bankruptcy, and after determination of his interest for the benefit of the wife and the issue of the marriage. The settlement contained an agreement by the husband to vest in the trustees upon certain trusts all property to which he should become entitled under the will of his father. The husband came of age about a month after he had executed the settlement. The father died nearly four years afterwards, leaving property by will to his son. More than a year after his father's death the husband repudiated the settlement :—

Held, affirming the decision of the Court of Appeal ([1892] 2 Ch. 278), that the settlement was as regards the husband voidable, not void; that if he chose to repudiate it he must do so within a reasonable time after he came of age; that he must be treated as knowing the contents of the deed whether he knew them or not; and that his repudiation not being made within a reasonable time, he was bound by the settlement.

APPEAL from an order of the Court of Appeal reported as *Carter* v. *Silber* (1). The action was brought by the respondents Carter and Lord Lisburne, as trustees of a marriage settlement, against the appellants and other persons (who were the remaining respondents) for a declaration (inter alia) that Martin Albert Silber (who had executed the settlement when an infant) was bound by it and could not repudiate it. Romer J. made an order declaring that M. A. Silber was entitled to repudiate the settlement (2). This decision was reversed by an order of the Court of Appeal (Lindley, Bowen and Kay L.JJ.) declaring that M. A. Silber was bound by the settlement and could not repudiate it (1). The present appellants were mortgagees under M. A. Silber. The circumstances are stated in the judgment of Lord Herschell L.C.

Sir *H. Davey* Q.C. and *Haldane* Q.C. (*Ingpen* with them) for the appellants:—

The time for repudiation or affirmance of an instrument executed during infancy is when the property comes into possession. There are many cases in the books in which a spinster minor has been allowed to repudiate a deed at any time, however long after its execution, when the question has become practical by the falling in of funds. Beyond the statements made by the Court of Appeal in this case, there appears to be no authority for the proposition that M. A. Silber must be supposed to have made himself acquainted with the stipulations of this settlement shortly after he came of age. All that M. A. Silber desires to repudiate is his own execution of the deed. He can repudiate his own covenant on making compensation, as compensation and not forfeiture is the principle in cases of election: see per Lord Cairns L.C. in *Codrington* v. *Codrington* (3). In *Smith* v. *Lucas* (4) Jessel M.R. held that a

(1) [1892] 2 Ch. 278.
(2) [1891] 3 Ch. 553.
(3) Law Rep. 7 H. L. 854, 860.
(4) 18 Ch. D. 531.

woman, married in 1856 when she was under age, was entitled to retain, against the settlement which contained a covenant for the settlement of after-acquired property, money which came into possession in 1880, and was not fettered by restraint on anticipation. She could retain the fund so acquired without making compensation out of the settled funds with respect to which she was restrained from anticipation. That doctrine was approved by the Court of Appeal in the case of *In re Vardon's Trusts* (1). *Zouch* v. *Parsons* (2) distinguishes the acts of an infant which are void or voidable, and those which are valid: and the conveyance of an infant mortgagee was held binding on the ground that it was an act which it was his duty to perform. In *Holmes* v. *Blogg* (3) an infant partner repudiated the partnership immediately on attaining his majority, but did not disclaim the partnership lease. He sought to recover the premium which he had paid on the lease, but was nonsuited by Park J. The Court however ordered a new trial. By the Infants' Relief Act 1874 (37 & 38 Vict. c. 62) s. 2, no action is to be brought to charge a person upon a promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of a promise or contract made during infancy. High authorities have differed as to the construction of this section. In *Coxhead* v. *Mullis* (4) the section was held a sufficient defence to a breach of promise of marriage. In *Ditcham* v. *Worrall* (5) the same question arose, but the Court differed as to whether there was a fresh promise or a ratification of the old promise. The statute abolishes the distinction between " void " and " voidable." What was formerly voidable is now void and there can be no ratification of a void contract. In the *Dublin and Wicklow Railway Company* v. *Black* (6) calls were made on railway shares which had been taken by an infant. It was held that the repudiation of the contract should have been within a reasonable time of attaining full age; but it was suggested that the plea ought to have alleged that the infant repudiated the contract before the calls became due. This supports the contention that until there is something on which the repudiation can act, the question cannot arise. It follows therefor that the repudiation has been made within a reasonable time.

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(1) 31 Ch. D. 275.
(2) 3 Burr. 1794.
(3) 8 Taunt. 35.
(4) 3 C. P. D. 439.
(5) 5 C. P. D. 410.
(6) 8 Ex. 181.

Farwell Q.C., *Hornell* and *Maidlow* for the respondents the trustees of the settlement and the persons interested thereunder, and

Chadwyck-Healey and *Frederic Thompson* for the respondent Amelia Silber, trustee of A. M. Silber's will, were not heard.

LORD HERSCHELL L.C.:—

My Lords, the point for determination in this appeal may be very shortly stated. On the 16th of October 1883 a settlement was executed in contemplation of a marriage between Martin Albert Silber and Lady Lucy Vaughan. At the time of its execution Martin Albert Silber the intending bridegroom was an infant; he did not come of age until the 19th of November 1883, just over a month afterwards. By the deed his father Albert Marcius Silber covenanted to pay the trustees of the settlement £1500 a year "during the life of Lady Lucy Vaughan and during such further period (if any) as there should be living any child or grandchild of the intended marriage." The trustees were to pay the yearly sum of £1500 to Martin Albert Silber during his life or until he should become bankrupt, and after the determination of his interest upon the trusts declared for the benefit of Lady Lucy Vaughan and the issue of the marriage. I need not trouble your Lordships with those trusts; they were for the most part, such as are commonly found in settlements of this description. Nor need I dwell upon the provisions relating to a policy of insurance. But by the settlement it was further agreed and declared that if Martin Albert Silber then was, or if he or the trustees for the time being, should become entitled to any property under any settlement executed, or to be executed, by Albert Marcius Silber, or under any appointment made or to be made, in exercise of any power in any such settlement contained or to be contained, or under or by virtue of the will of Albert

Marcius Silber, or the will of Amelia Silber his wife, or any codicil thereto, or by virtue of the intestacy of either of them, then, unless such settlement or appointment, or will or codicil, should otherwise direct, such property, if not thereby given to the trustees, should be vested in them upon such trusts for sale or conversion as might be necessary or expedient, and subject thereto upon the trusts, and with and subject to the powers contained with respect to the moneys assured by or to become payable under the policy of insurance, except that the ultimate trust should be in favour of Martin Albert Silber instead of Albert Marcius Silber (his father), "and the amount or value of all property so acquired by the trustees should be deemed to fall within the operation of the clause or provision lastly thereinbefore contained, and be applicable accordingly by way of satisfaction, pro tanto at the rate aforesaid, of the yearly sum so covenanted to be paid by Albert Marcius Silber;" the effect of this provision being that, if any money was left to Martin Albert Silber under the will of Albert Marcius Silber, the father, that money was to pass to the trustees of the settlement and be held by them upon the trusts of the settlement, to the extent to which it was sufficient to do so, in lieu of the obligation and covenant to pay the £1500 a year.

My Lords, the settlement having been executed, and the infant having come of age on the 19th of November 1883, the father made a will leaving his two sons residuary legatees. The father died on the 14th of May 1887, and his will and codicil were proved in July 1887. There was nothing which can be regarded as a repudiation by Martin Albert Silber until July 1888. Now, my Lords, it is not disputed that this contract executed and entered into by Martin Albert Silber was not absolutely void, but was voidable only, that is to say, that after he came of age it was as binding as if he had been of age at the time when he executed it, subject only to this, that the law enabled him to avoid his obligations provided he did so within a reasonable time.

My Lords, I did not understand the learned counsel for the appellants really to dispute the proposition that the repudiation in order that the obligations may be got rid of must be within a reasonable time after the minor ceases to be a minor. The controversy has been as to what elements may be taken into account in determining whether more than a reasonable time has elapsed. In the present case, as I have shewn your Lordships, there was no repudiation at all during the lifetime of the father. Down to the death of the father nothing had been done by the son; and it is impossible not to see that if the son had repudiated in the lifetime of the father it is in the highest degree probable that the disposition made by the father would have been different from what it was, as it is certain that the position of those taking, or at all events of one of those taking, under the will of the father was altered for the worse by reason of this repudiation if the repudiation was effective.

Now, my Lords, the first question is whether the infant was entitled to wait until an actual sum of money came to him to which this covenant could apply before he made the repudiation. I think that is a proposition which it is absolutely impossible to regard with seriousness—that this covenant being binding unless he repudiates it within a reasonable time, he is entitled to wait to see how in respect of any particular sum of money the covenant will operate, and when he has made up his mind whether with regard to that sum of money it will be beneficial to him or not, he can then, and not till then, be said to have his proper opportunity of making the determination!

Then it is said that in considering whether a reasonable time has elapsed you must take into account the fact that he did not know what were the terms of the settlement, and that it contained this particular covenant. He knew that he had executed a deed—he must be taken to have known that that deed though binding upon him could be repudiated when he came of age. And, my Lords, it seems to me that in measuring a reasonable time, whether in point of fact he had or had not acquainted himself with the nature of the obligations which he had undertaken is wholly immaterial. The time must be measured in precisely the same way whether he had so made himself acquainted or not. I do not say that he was under any obligation to make himself acquainted with the nature of the deed which, having executed as an infant, he might or might not at his pleasure repudiate when he came of age. All I say is this, that he cannot maintain that the reasonable time when measured must be a longer time because he has chosen not to make himself acquainted with the nature of the deed which he has executed.

My Lords, having put aside those two contentions, the only question comes to be, Has a reasonable time been exceeded? The learned judges in the court below expressed their opinion that the period which elapsed, a period of between four and five years, was more than a reasonable time. It is not at all necessary for your Lordships to lay down what would have been a reasonable time in this case. It is enough to say that in my opinion it is impossible to hold that the learned judges in the court below have in any way erred in saying that more than a reasonable time had elapsed.

I therefore move your Lordships that this appeal be dismissed with costs.

LORD WATSON :—

My Lords, this is in my opinion a very plain case, so plain that I do not feel justified in detaining the House by any comments upon either the fact or the law. The law gave this minor the privilege of repudiating the obligations which he had undertaken during his minority within a reasonable time after he came of age. It laid no obligation upon him—it merely conferred upon him a privilege of which he might or might not avail himself, as he chose. If he chooses to be inactive, his opportunity passes away; if he chooses to be active, the law comes to his assistance. In this case, my Lords, it appears to me that the period of four years and eight months which he permitted to elapse before he took any steps in the matter cannot possibly be regarded as a reasonable time.

LORD HALSBURY :—

My Lords, I am of the same opinion. I should only like to add that I adopt the words of Lindley L.J., who says: "Whether the defendant could have repudiated the deed in five or six or nine months after he came of age I do not care to discuss; but to ask us to hold that he repudiated within a reasonable time is to ask us to hold that which no reasonable man could think of holding."

LORD MACNAGHTEN :—

My Lords, I agree. It seems to me that every one who is of sufficient age and intelligence to execute a deed, whether he be an infant or a man of full age, and who does execute a deed, must be treated as knowing the contents of the instrument which he executes; and therefore I think it is immaterial to inquire whether Mr. Martin Silber knew or did not know the particular covenant in question. I do not think he is entitled to any indulgence on the ground that he was not in fact aware of the obligation which he undertook. If Mr. Silber is not entitled to any special indulgence on account of ignorance of his own deed there is an end of the case, because no one would seriously contend, apart from special circumstances, that a period of more than four years is a reasonable time for a man to take to consider whether he will repudiate a deed or not.

LORD MORRIS :—

My Lords, I concur.

LORD SHAND :—

My Lords, I am also of the same opinion. It seems to me reasonable to require of a minor that immediately after attaining his majority he should make himself acquainted with the terms and effect of such deeds as he has executed in minority, and that if he fails to do so and the rights of others have in the meantime been affected he must thereby be held to have lost his right of repudiation. Lord Justice Kay has put the point which I desire to emphasize as applicable to the present case very clearly in these words. The minor "knew that he had executed a settlement; he says now, 'I did not know' or 'I did not remember' or 'It was not present to my mind,' which probably would be a more correct way of stating the result of his evidence, 'that there was in this settlement a covenant by me to settle after-acquired property.' But he knew he had executed the settlement; he knew he was receiving the benefits under the settlement; and if he did not choose to look into the settlement and see to what extent it bound him and any property that might come to him, that cannot be taken as an excuse, in my opinion, for his not having exercised his right of disaffirmance some years at least before he attempted to do so."

My Lords, I think the importance of laying down the rule as it has been stated by your Lordships is very clearly illustrated in this case by the circumstance that if the minor had intimated, shortly after he reached majority, that he declined to be bound by the stipulation in his marriage contract of which he now complains, there is every reason to believe that his father would have made an entirely different settlement from that which he left to regulate the distribution of his estate at the time of his death.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 2nd June 1893.

Solicitors for the appellants: *Hicks, Arnold, & Morley.*

Solicitors for the respondents, trustees of the settlement: *Gadsden & Treherne.*

Solicitors for the respondent, trustee of the settlor's will: *Simpson & Cullingford.*

Solicitors for the respondents, persons interested under the settlement: *Arnold & Henry White.*

[HOUSE OF LORDS.]

FRANCIS RIDOUT WARD AND CHARLES PEMBERTON . . . . } APPELLANTS;

H. L. (E.)
1893
July 15.

AND

THOMAS MATTHEW DUNCOMBE AND OTHERS . . . . } RESPONDENTS.

Mortgage—Chose in action—Priority—Notice to one of several Trustees—Inquiry of Trustees—Death of only Trustee who has Notice.

By a marriage settlement the wife's share in a personal fund held on the trusts of a will was settled. S., one of the two trustees of the will, knew of the settlement; E., the other trustee, did not. Afterwards the husband and wife proposed to mortgage this share without disclosing the settlement. The intending mortgagees inquired of S. and E. about incumbrances. S. returned an evasive answer; E. replied that he knew of no incumbrance. The mortgagees, without making further inquiry of S., advanced their money and gave formal notice of their security both to S. and E. S. died and another trustee was appointed. In administering the testator's estate a question of priority arose:—

Held, affirming the decision of the Court of Appeal (*In re Wyatt* [1892] 1 Ch. 188), that the trustees of the settlement were entitled to the share in priority to the mortgagees; for the death of S. could not deprive the trustees of the priority which they had already acquired during his life.

APPEAL from an order of the Court of Appeal, reported as *In re Wyatt; White* v. *Ellis* (1). The following statement of the facts is taken from the judgment of Lord Herschell L.C.:—

By his will, bearing date the 28th of April 1847, Matthew Cotes Wyatt bequeathed certain leasehold property to his executors upon trusts for sale and otherwise, so that in the events which happened four-thirtieths of the surplus rents of the same became payable to the testator's son, Matthew Wyatt, during his life, and on his death the trustees were directed to pay one moiety thereof equally between and among the children of Matthew Wyatt, of whom Mary Wyatt was one. M. C. Wyatt died on the 3rd of January 1862, and his will was proved by Henry Lockyer Sharp and William Ellis, two of the executors

(1) [1892] 1 Ch. 188.

therein named. Mary Wyatt having attained the age of twenty-one years was married on the 16th of July 1864 to Thomas Henry Duncombe. By the settlement made in contemplation of this marriage the share and interest to which Mary Wyatt was entitled under the will of M. C. Wyatt were assigned to Frederick Wyatt upon certain trusts. It is not asserted that William Ellis had notice of this settlement. It was a matter in controversy in the Courts below whether H. L. Sharp had notice of it. The point was contested at the bar of this House, but I do not think any of your Lordships entertain a doubt that the finding of the Courts below that he had such notice must be affirmed.

In the month of September 1875 the Law Union Fire and Life Insurance Company was applied to for an advance of £300, part of the security proposed being the share to which Mary Duncombe was entitled under M. C. Wyatt's will. Inquiries were addressed to William Ellis and Henry Lockyer Sharp, as the trustees of that will, with the view of ascertaining whether they had received notice of any mortgage, charge, or incumbrance upon the share of Mary Duncombe. William Ellis replied to this question in the negative. Henry L. Sharp, in reply to the letter of inquiry, stated that he could only refer to the will of M. C. Wyatt. On the 27th of October 1875 Thomas H. Duncombe and Mary Duncombe assigned to the appellants and another director of the Law Union Fire and Life Insurance Company, since deceased, all the share and interest of Mary Duncombe under the will of M. C. Wyatt to secure the repayment of £300 and interest. Notice of this indenture was given to William Ellis and Henry L. Sharp. In the month of February 1876 the insurance company was applied to for a further advance. Similar inquiries were addressed to William Ellis and Henry L. Sharp. William Ellis replied that he had received no notice of any incumbrance since he last wrote. No reply was received from Henry L. Sharp. On the 22nd of February 1876 the share and interest of Mary Duncombe were further charged in favour of the same persons as before, with the repayment of £200 and interest, and notice of this indenture was also given to William Ellis and Henry L. Sharp. On the 28th of August

1878 Henry L. Sharp died, and in October 1881 Thomas Evitt was appointed a trustee of the will of M. C. Wyatt in his place. Matthew Wyatt died on the 19th of July 1886, and down to the month of September 1886 both William Ellis and Thomas Evitt were ignorant of the existence of the settlement of the 16th of July 1864.

In an action brought for the administration of the testator's estate, an inquiry was directed as to incumbrances on Mary Wyatt's share under the testator's will, and as to the persons entitled to that share. Stirling J. by an order varying the chief clerk's certificate allowed the claim of the trustees of the marriage settlement, and disallowed the claim of the directors of the insurance company under the mortgages to the company. This order was affirmed by the Court of Appeal (Lindley, Bowen and Fry L.JJ.) (1). Against this decision the directors of the insurance company appealed.

Feb. 3; March 7, 10. Sir *John Rigby* S.G. and *E. S. Ford* for the appellants:—

The Courts below felt themselves bound by authorities which do not bind this House; and all these authorities refer to assignments of equitable interests, and not to mortgages. There are decisions to the effect that if notice is given to one only of two trustees and he dies, a subsequent notice to the surviving trustee will obtain priority for the second charge or assignment over the first. The doctrine deducible from *Dearle* v. *Hall* (2) is that the assignee of an equitable interest, if he will be secure, must make the trustees trustees for himself. The doctrine depends on the receiving, not on the giving of notice. The conscience of the trustee must be affected, whether by direct intimation or through other channels. The title is not perfect until the trustee's conscience is thus reached; but how it is reached is immaterial. The notice given to a trustee is a continuing notice. The appellants gave a written notice to both trustees and received acknowledgments in writing; and because they did not renew that notice on the death of Sharp it has been held inoperative.

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(1) [1892] 1 Ch. 188.

(2) 3 Russ. 1.

But the true doctrine is that notice to one, if not passed on to the other, is on the death of the first completely gone. Unless the property is conveyed to the assignee by indorsement on the instrument, a mere notice to all the trustees will not give a title in perpetuum: all may die. James L.J. in *Phipps* v. *Lovegrove* (1) pointed out the difficulties which may arise on the appointment of new trustees. If all the trustees have notice, and all die or retire, the notice is exhausted. Thus you may have a good title to-day and a bad one to-morrow: *Dearle* v. *Hall; Loveridge* v. *Cooper* (2); *Foster* v. *Cockerell* (3); *Foster* v. *Blackstone* (4). The doctrine, which is of modern origin, does not depend on negligence or diligence. The trustees rely on the accident that Sharp was independently informed of the settlement. It is part of the system that mere notice, ipso facto, makes a man trustee without any act on his part, but until *Dearle* v. *Hall* (2) was decided the question was almost an open one. In real estate incumbrances rank according to date, and the question of notice is immaterial; and in order to postpone an incumbrancer negligence or misconduct of some kind must be proved. The origin of the modern doctrine of notice is to be sought in the principle of "order and disposition" in bankruptcy. This House is at liberty to go back to first principles, reconcile apparent contradictions, and lay down coherent rules. Of course the element of priority must come in when several notices of different trusts are given to several trustees. Then the first notice received is the prerogative notice. But priority in time is the last consideration. Sir T. Plumer's decision in *Loveridge* v. *Cooper* was affirmed by Lord Lyndhurst (2). In *Lloyd* v. *Banks* (5) a trustee who was a solicitor learnt from a newspaper the insolvency of the cestui que trust, and acted on the information. It was held that a subsequent assignee who gave formal notice did not thereby acquire priority over the assignee in insolvency.

The term "negligence" is inapplicable—what is meant is that the person who misses giving the first notice fails to take prudent precautions. So far as personal contract goes, no notice is necessary; but to perfect title you must make the trustee your trustee. If you fail to give notice in time, your negligence is the same as that of the man who leaves his chattels in the apparent possession of another. The postponement does not really affect title; but the effect of it is to give prior possession to another. The doctrine does not depend upon inquiry: *Wright* v. *Lord Dorchester*, cited in *Loveridge* v. *Cooper* (1). It rests solely on the trustee's conscience being affected by notice. When it is so affected he is trustee for all purposes, and would be liable for breaches of trust. The trustee has a right to consider the original cestui que trust only until he receives notice of assignment. In *Foster* v. *Blackstone* (2), which came before the House of Lords sub nom. *Foster* v. *Cockerell* (3), a second incumbrancer of an equitable interest, by giving notice to the trustees, obtained priority over a previous incumbrancer who had given no such notice. Notice and precaution are throughout the guiding principles. The same doctrine was applied to the question of order and disposition in bankruptcy in *Smith* v. *Smith* (4). A casual mention of a charge in conversation was held sufficient notice to give priority over the bankruptcy assignees.

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(1) Law Rep. 16 Eq. 80, 90.

(2) 3 Russ. 1.

(3) 3 Cl. & F. 456.

(4) 1 My. & K. 297.

(5) Law Rep. 3 Ch. 488.

It is settled that if you give notice to one trustee and he dies without having communicated the notice to the others, and another incumbrancer or assignee gives notice to the survivors, the survivors are not trustees for you. Wigram V.C., in *Meux* v. *Bell* (5), said the question was settled by Lord Lyndhurst in *Foster* v. *Cockerell* (3). Yet you made a good title by securing one trustee as yours. If the appellants had repeated the notice to Ellis the day after Sharp's death they would have obtained priority; but priority only lasts as long as the notice lasts. *Timson* v. *Ramsbottom* (6) is an instance of a notice being spent. A father who was sole acting executor made advances to his son without communication to the other executors; after the father's death the son obtained a further advance, of which notice was given to the surviving executors; the second

(1) 3 Russ. 49.
(2) 1 My. & K. 297.
(3) 3 Cl. & F. 456.
(4) 2 Cr. & M. 231.
(5) 1 Hare, 73.
(6) 2 Keen, 35, 48.

incumbrancer obtained priority. *Burrowes* v. *Lock* (1), which has been much misunderstood, was a case of misrepresentation by a trustee. In *Ex parte Boulton* (2) Turner L.J. said it was the duty of the recipient of a notice to hand it over to the person having control of the funds. See also *Browne* v. *Savage* (3); *Willes* v. *Greenhill* (4); *Re Hall; Nolan* v. *O'Brien* (5); *Arden* v. *Arden* (6). The whole doctrine of *Burrowes* v. *Lock* (1) and *Slim* v. *Croucher* (7) is fully explained in *Low* v. *Bouverie* (8), which has dissipated the notion that a trustee is bound to give true information. The result is that inquiry cannot lead to certainty or safety, and that notice may be valueless as a precaution. If the notice is given to all the trustees, it may be exhausted and made worthless by their deaths; and if notice is given to one only, the risk is still greater. There is no definite and intelligible rule on which reliance can be placed.

Graham Hastings Q.C. (*S. B. L. Druce* with him) for the respondents:—

The whole position is summed up by Stirling J. (9). After reviewing the authorities, he says: "If there be at the time when the inquiry is made an existing notice, and the person making inquiry chooses to proceed in the absence of any answer from the trustee to whom it has been given, the reason on which these cases are based does not apply." In *Low* v. *Bouverie* (10) Lindley L.J. states the law thus: "An incumbrancer of a trust fund who first gives notice to any of its trustees obtains priority over any prior incumbrancer who has given no notice to any of them." On this Stirling J. observes: "If the correct view be that an intending incumbrancer or assignee who chooses to proceed without obtaining information from each trustee does so at his own peril, and thereby obtains only such title as his mortgagor or assignor can confer, I fail to see how that title is improved by the subsequent death of the trustee to whom the prior incumbrancer has given notice." The doctrine of notice has been formulated to prevent dishonesty, and would never have arisen if all mortgagors were honest. The term "perfecting the title" is misleading—the purchaser's title is good without notice. Notice is only material as between competing incumbrancers. The expression "making a trustee" is misleading and breeds confusion. It is not the notice, but the assignment, which makes the trustee trustee for the assignee. Through all the cases runs the same purpose—the prevention of dishonesty. It was this object which led to the exception made to the general rule in cases where the trustee had, being himself the assignor, an interest in concealing the truth: *Browne* v. *Savage* (1). The system is not satisfactory, but the most satisfactory conclusion is that at which the Courts below have arrived. If the Solicitor General's argument were to prevail, the only safety would be in insuring the trustee's life.

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(1) 10 Ves. 470.
(2) 1 De G. & J. 163, 179.
(3) 4 Drew. 635.
(4) 4 D. F. & J. 147.
(5) 7 L. R. Ir. 180, 186–7.
(6) 29 Ch. D. 702, 708.
(7) 1 D. F. & J. 518.
(8) [1891] 3 Ch. 82.
(9) [1892] 1 Ch. 199.
(10) [1891] 3 Ch. 82, 104.

Ford, in reply.

The House took time for consideration.

June 15. LORD HERSCHELL L.C. (after stating the facts given above, proceeded as follows):—

My Lords, under these circumstances the question has arisen whether the security of the appellants has priority over the settlement.

It was admitted on behalf of the appellants that knowledge of the settlement by Henry L. Sharp was sufficient to prevent the securities of the appellants obtaining priority over the settlement at the time when notice of those securities was given to the trustees, even though such notice was given to both trustees; but it was contended that upon the death of Henry L. Sharp the knowledge which he possessed ceased to be of any effect, and that the only effectual notice from that date was the notice received by William Ellis, and that consequently upon Henry L. Sharp's death the appellants' security obtained priority.

It was said to be settled by authority that when one of two trustees has received notice of an assignment and dies, a person

(1) 4 Drew. 635, 640.

taking an assignment after his death, and giving notice of it to the other trustee, has priority over the assignment earlier in date, and it was argued that the same rule was equally applicable where the second assignment had been taken during the lifetime of a trustee who had notice of the prior one, if the remaining trustee had notice only of the later one. It was admitted that there was this distinction between the two cases—that in the former the second security obtained priority over the earlier one as soon as notice was received by the remaining trustee, whilst in the latter the person entitled under the second assignment did not obtain priority at the time of this notice to the trustees, but only on the death of the trustee who had notice of the prior incumbrance. But this it was said is immaterial; the principle on which the rule is based being, that the receipt of the notice of an assignment by a trustee makes him trustee for the person giving such notice; that when he dies he ceases to be such trustee, and the surviving trustee is trustee only for the person of whose interest he has had notice. The contention thus insisted on by the appellants renders it necessary to consider the authorities.

The doctrine that where a fund is legally vested in trustees, an assignee or incumbrancer who gives notice to the trustees has a better title in equity than an assignee or incumbrancer of earlier date who has not given such notice, is of comparatively recent origin. It was so decided for the first time in the cases of *Dearle* v. *Hall* and *Loveridge* v. *Cooper* (1). The Master of the Rolls (Sir T. Plumer), before whom these cases came in the first instance, pointed out that where a contract was made behind the back of those in whom the legal estate was vested, it was necessary, if the security was intended to attach to the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of; that is, by giving notice of the contract to those in whom the legal interest is. "By such notice," he said, "the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him, and the cestui que trust is deprived of the power of carrying the same security into the market and of inducing third persons to advance money upon it under the erroneous belief that it continues to belong to him absolutely free from incumbrance." The learned judge then dwelt on the consideration that the assignee or incumbrancer who has not given notice has been guilty of neglect, that the consequence of such neglect is to cause the cestui que trust to appear to be the real owner and so to enable him to commit a fraud, and that this must be considered as foreseen by those who omit to give notice. He next adverted to the fact that the title of each of the claimants was equitable only, and asked what title those who had given no notice, and but for their negligence could have prevented the mischief, had to call on the Court to intervene on their behalf as against the other claimants who had used due diligence. He relied on the law laid down in *Ryall* v. *Rowles* (1), that if you leave another in apparent possession of personal property, you enable him to gain false credit and must take the consequences, and asked whether there was any doubt that if the cestui que trust had been a trader all that was done by the first assignees would not have availed against his assignees in bankruptcy. He proceeded to say: "In that case it was the opinion of all the judges that he who contracts for a chose in action and does not follow up his title by notice gives personal credit to the individual with whom he deals. Notice then is necessary to perfect the title—to give a complete right in rem, and not merely a right as against him who conveys his interest."

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(1) 3 Russ. 1.

When the cases came on appeal before Lord Lyndhurst L.C. he thus expressed himself: "Sir Thomas Plumer was of opinion that the plaintiffs had no right to the assistance of a Court of Equity to enforce their claim to the property as against the defendants, and that having neglected to give the trustees notice of their assignments, and having enabled the cestui que trust to commit this fraud, they could not come into this Court to avail themselves of the priority of their assignments in point of time in order to defeat the right of persons who had acted as the defendants had acted. In that opinion I concur." He further said: "Where personal property is assigned delivery is necessary to complete the transaction, not as between the vendor and vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in the person who in fact is not the owner." After referring to and relying on *Ryall* v. *Rowles* (1), the grounds of the judgment in which case were not, he said, only applicable to a case of bankruptcy, but were of general application, he added: "In cases like the present the act of giving the trustee notice is in a certain degree taking possession of the fund; it is going as far towards equitable possession as it is possible to go, for after notice given the trustee of the fund becomes a trustee for the assignee who has given him notice. It is upon these grounds I am disposed to come to the same conclusion as the Master of the Rolls."

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(1) 1 Ves. 348.

It is impossible, I think, to read these judgments without seeing that the leading consideration which induced the Court to lay down the rule that he who gives notice has a better equitable right than a prior incumbrancer who has given no notice was this, that any other decision would facilitate fraud by the cestui que trust, and cause loss to those who might have used every precaution that was possible to ascertain, before parting with their money, that the title they were taking was a valid one, and who might have done everything they could to render that title secure. It is true that reference was made to the fact that the party giving notice had done all that was necessary to perfect his title, whilst he who had not given notice had not perfected it. But even here I think the point upon which stress was laid was this, that the party giving notice had taken the property out of the apparent ownership and possession of the cestui que trust. This is indicated by the importance attached to the opinions of the judges in *Ryall* v. *Rowles* (1). Those opinions do not appear, as the law is now settled, to be of such general application as was thought by Lord Lyndhurst. But the importance attached to them throws light upon the considerations which led to the judgments in the cases before Sir T. Plumer and Lord Lyndhurst.

The question next came before the Courts in *Foster* v. *Blackstone* (2), where the Master of the Rolls (Sir John Leach) decided in favour of a later assignee, who had given notice to the trustees, as against a prior assignee who had not given notice, notwithstanding that the later assignee had not made any inquiry of the trustees. He said: "I am of opinion that Sir C. Cockerell is entitled to priority over the plaintiffs by reason of his notice to the trustees. In this respect he has a better equity because he has taken a protection against a subsequent incumbrancer, which the plaintiffs neglected to take." The reasoning here is perhaps a little obscure; but I understand the ground of the judgment to be that the first incumbrancer had left the fund in the apparent possession of the cestui que trust, whilst the second incumbrancer had taken it out of such apparent possession. The decision of the Master of the Rolls was affirmed by this House in the case of *Foster* v. *Cockerell* (1). Lord Lyndhurst said that in *Dearle* v. *Hall* (2) the reason on which the Master of the Rolls adopted the principle of priority of notice giving priority in equity as the rule for his decision, was, that if a contrary doctrine prevailed, it would enable a cestui que trust to commit fraud by assigning, first to one incumbrancer and then to another, and the later incumbrancer would have no opportunity of ascertaining, by any communication with the trustees, whether or not there had been a prior assignment. Another principle, he said, acted on by the Master of the Rolls, was that a party, till he gave notice to the trustees, had not done everything that was necessary to complete his title. It will be observed that Lord Lyndhurst again puts in the forefront, as the ground of the decision in *Dearle* v. *Hall* (2), the apparent possession left in the cestui que trust. He treated it as immaterial that the second incumbrancer had not made inquiry of the trustees, where such inquiry would not have led to a knowledge of any prior incumbrance. In *Smith* v. *Smith* (3), which was decided by the Court of Exchequer when Lord Lyndhurst was Chief Baron, and before the appeal was heard in *Foster* v. *Cockerell* (1), one of three trustees had knowledge of an assignment, and it was held that this knowledge was as effectual as if there had been express notice. The Chief Baron said that no valid assignment could have been made by the assignor after the

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(1) 1 Ves. 348.

(2) 1 My. & K. 297.

(1) 3 Cl. & F. 456.

(2) 3 Russ. 1.

(3) 2 Cr. & M. 231.

notice to the trustee. A second assignee, in order to obtain priority over the plaintiff, must, he said, have shewn that he had exercised proper caution in taking the assignment, that he had applied to the trustees to know if any previous assignment had been made, and unless he applied for these purposes to each of the trustees he would not have exercised due caution, or done all that he ought to have done. But if he applied to each of the trustees he would have been informed of the assignment by the trustee who had notice, and must have taken, if at all, subject to the claim of the plaintiff. The language thus used by the Chief Baron is somewhat remarkable. It would seem, if correctly reported, to indicate the view that a second incumbrancer would only obtain priority over an earlier one if he had used due caution, and had, in fact, made such inquiry as a prudent man would of each of the trustees. This view is in direct conflict with the decision of this House two years later in *Foster* v. *Cockerell* (1), in which Lord Lyndhurst himself delivered the leading opinion. In that case *Smith* v. *Smith* (2) does not appear to have been referred to, and the fact that no inquiry had been made by the incumbrancer to whom priority was given was regarded as wholly immaterial; indeed, it was not even mentioned by Lord Lyndhurst, who treated the case as governed by the principle laid down in the earlier decisions. I cannot but think, therefore, that either there is some inaccuracy in the report of Lord Lyndhurst's judgment in *Smith* v. *Smith* (2), or that he can have intended to say no more than this, that where one of several trustees has notice of an incumbrance, the cestui que trust is no longer left in apparent possession, for any person asked to take a subsequent assignment, and adopting the precaution which a prudent man would of inquiring of all the trustees, would come to know of the prior incumbrance.

In *Timson* v. *Ramsbottom* (3) one of several executors (he was himself the assignee) had notice of an assignment, the other executors had not. After the death of the executor who had notice, there was an assignment to a third person, who gave notice of it to one of the surviving executors; he was held entitled to priority over the first assignee. Lord Langdale M.R., in delivering judgment, referred to the fact that in *Smith* v. *Smith* (1) notice to one of several trustees had been held sufficient, and suggested that in that case there might have been circumstances to induce the Court to presume that the trustee who had notice communicated his knowledge to his co-trustees. I can find nothing to warrant this suggestion in the statement of facts in *Smith* v. *Smith* (1), nor does it appear consistent with the reasons given for the judgment. But Lord Langdale truly said that none of the cases cited were like that before him. He pointed out that each one of the executors had separate authority to receive and pay on account of the estate, and if he had no notice of the assignment might have made payment to the assignor without incurring any liability on that account. There was an appeal from this decision to the Lord Chancellor, but the parties agreed on a compromise. All the previous decisions were very carefully examined by Wigram V.C. in the case of *Meux* v. *Bell* (2). After stating that in the absence of notice the party claiming the prior incumbrance had not perfected his title, as he had failed to do all that was in his power, and that the second incumbrancer who gave notice had acquired a perfect assignment, whilst the first assignment was imperfect, he proceeded to inquire whether, where there were several trustees, the incumbrancer in order to perfect his security must give notice to all of them, or whether notice to one would be sufficient. That the latter would be sufficient he regarded as settled in the affirmative by the case of *Smith* v. *Smith* (1). He pointed out that *Smith* v. *Smith* (1) and *Timson* v. *Ramsbottom* (3) were not in conflict: "In *Smith* v. *Smith* (1) inquiry would in the circumstances of that case have led to a knowledge of the prior incumbrance, and the notice was, therefore, properly held sufficient. In *Timson* v. *Ramsbottom* (3), inquiry would not have led to a knowledge of the prior incumbrance, and the notice was properly held insufficient." I entirely agree with the Vice-Chancellor in the distinction which he draws between these two cases. Where at the time the second advance is made one of the trustees has notice of a prior incumbrance, I

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(1) 3 Cl. & F. 456.

(2) 2 Cr. & M. 231.

(3) 2 Keen, 35, 52.

(1) 2 Cr. & M. 231.

(2) 1 Hare, 73.

(3) 2 Keen, 35, 52.

see no reason why notice of the second incumbrance should give it priority over the earlier assignment. The fund was not at the time of the second advance left in the apparent possession of the cestui que trust. The person asked to make the second advance could have protected himself had he chosen to make that inquiry of all the trustees which prudence enjoined. Where, however, notice is given to one trustee only, who is no longer a trustee at the time the second incumbrancer advances his money, a condition of things has arisen precisely similar to that which led to the rule laid down in *Dearle* v. *Hall* (1). The fund is again in the apparent possession of the cestui que trust. No inquiry of the trustees will avail to protect any one who is asked to make an advance upon the security, or take an assignment of the cestui que trust's interest in the fund. In those circumstances the reasons which led the Court to hold, in the case referred to, that the title of the second incumbrancer or assignee who had given notice must prevail over that of the assignee or incumbrancer earlier in date, are equally applicable. But they do not, in my opinion, at all warrant the conclusion that where at the time of the second advance and notice the trustees, through one of their number, were in possession of notice of a prior assignment, the later assignment, although it is not, at the time when notice of it is received by the trustees, entitled to priority over the earlier assignment, becomes entitled to such priority when the trustee who had notice of that assignment dies or ceases to act. I see no sound ground for holding that the priority shifts by reason of a circumstance wholly independent of the incumbrancers, and which does not touch or affect any action on their part. Why should an accident of this description entitle the second incumbrancer to a priority to which he had no title at the time when he made the advance, and gave notice of it to the trustees? The property was not then in the apparent ownership of the cestui que trust. Due inquiry would presumably have revealed the existence of the earlier assignment. If I am right in the view which I have taken of the basis on which the equitable rule as to notice rests, it disposes of the contention of the appellants.

(1) 3 Russ. 1.

I need not trouble your Lordships with any lengthy reference to the decisions subsequent to those to which I have already referred. In a case of *Willes* v. *Greenhill* (1), which came before Lord Westbury sitting as Lord Chancellor, the view that notice to one trustee was in general sufficient to prevent a subsequent assignee obtaining priority was again affirmed on the authority of *Smith* v. *Smith* (2), with which the Lord Chancellor expressed his concurrence.

I ought perhaps to notice a recent decision that trustees of a fund are not under any legal obligation to answer inquiries put to them as to existing incumbrances, because that decision was much pressed upon your Lordships by the learned counsel for the appellants. If the trustees, or any of them, were to decline to answer such inquiries, it seems to me that the intending incumbrancer would take the risk upon himself of whatever prior incumbrances there might chance to be. He would be dealing with property which he had no sufficient ground for concluding was at the disposal of the cestui que trust. He would not be deceived by any apparent possession.

For these reasons I think the judgment appealed from ought to be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN:—

My Lords, the precise question which your Lordships have to consider has not, it seems, been the subject of decision in any previous case.

A lady was entitled in remainder to a share of a fund in the hands of trustees. She married, and on her marriage she settled her share, reserving only a life interest. There were two trustees of the fund at the time. One, a Mr. Sharp, was actively concerned in the arrangements for the settlement; and upon the evidence it must, I think, be taken that he had notice of the execution of the settlement and of its contents. Eleven years later the lady and her husband, concealing the settlement, proposed to mortgage her share as unincumbered. The intending mortgagees applied to the trustees of the fund for information. Mr. Sharp gave an answer which was nothing to the point, but he was not pressed further. The other trustee stated, apparently with truth, that he had not received notice of any incumbrance. The mortgage was completed, and formal notice of it was sent to both the trustees of the fund. Receipt of the notice was acknowledged by Mr. Sharp's co-trustee, but not by Mr. Sharp. Not long afterwards Mr. Sharp died without having informed his co-trustee, who survived him, of the existence of the settlement. And so the fund was left under the dominion of a sole trustee with notice of the mortgage, but without notice of the settlement. The fund has now become divisible; and the question is a question of priority between the settlement and the mortgage.

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(1) 4 D. F. & J. 147.

(2) 2 Cr. & M. 231.

It was contended by the appellants that under the circumstances, assuming the settlement to have had priority over the mortgage while both the trustees were living, it lost its position and precedence on the death of Mr. Sharp.

The case was very fully argued, and all the authorities as to the effect of notice in questions of priority between equitable assignees were cited and discussed.

The doctrine that an assignee of an equitable interest in personal estate without notice of an existing prior assignment may gain priority simply by the act of giving notice to the person who has legal dominion over the fund before notice is given by the earlier assignee, is quite a modern doctrine. Mr. Sturt's case (1) in 1809 has sometimes been referred to as affording an indication that Lord Eldon's view might have been favourable to the doctrine. But that case really throws no light upon the point. The special circumstances there were quite sufficient of themselves to justify an order made on an interlocutory application, and guarded by security for repayment. The doctrine undoubtedly had its origin in the cases of *Dearle* v. *Hall* and *Loveridge* v. *Cooper* (2), which were decided in the first instance by Sir Thomas Plumer in 1823. No trace of it is, I believe, to be found in any earlier case in the Court of Chancery.

At that time, under the Bankruptcy Act then in force, in the case of an assignment of a chose in action, notice was requisite in order to take the property out of the order and disposition of the assignor. And it was the practice of conveyancers upon the purchase or mortgage of a chose in action or any equitable interest to require notice of the sale or mortgage to be given to the person who had the legal title—a very proper precaution in order to avoid the statutory consequences of bankruptcy, and expedient in every case in order to prevent the legal owner parting with the property to the assignor, as he would of course be justified in doing at the proper time, in the absence of notice of assignment. It had also been suggested by text-writers that, in a question of competition between equitable assignees, a Court of Equity might not improbably prefer a subsequent assignee who had given a proper notice to a prior assignee who had neglected that precaution. But before *Dearle* v. *Hall* (1) that view had not received any judicial sanction. And, indeed, in *Cooper* v. *Fynmore* (2), which was decided in 1814, though not reported till 1830, Sir Thomas Plumer himself, when Vice-Chancellor, had declined to adopt it. "Mere neglect of notice," he said, "was not sufficient to postpone" a prior incumbrancer. "In order to deprive him of his priority it was necessary that there should be such laches as in a Court of Equity amounted to fraud." And he held the prior incumbrancer entitled to priority "upon principle and upon authority."

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(1) *Wright* v. *Lord Dorchester*, 3 Russ. 49 n.

(2) 3 Russ. 1.

Dearle v. *Hall* (1) was twice argued. On the first hearing the Master of the Rolls declined coming to any final judgment. But he went through the facts of the case, and stated that the principle on which he chiefly relied was that the plaintiffs, who were the prior incumbrancers in point of time, had been negligent, and that in consequence of their negligence third parties had been involved in transactions which could not have taken place but for their default; they had caused the mischief. "Under such circumstances," he thought, "the general rule of priority ought to be qualified." On the second hearing the Master of the Rolls pronounced a very elaborate judgment. He contrasted the conduct of the plaintiffs with the conduct of the defendant. The plaintiffs, he said, were "guilty of negligence, of gross negligence, which exposed the property to all that has since happened—which enabled" the assignor "to practise on another innocent individual so as to induce him to lend his money without any suspicion of the existence of the preceding conveyance—which, leaving the trustees in ignorance of the fact," induced them to make a misrepresentation. Under these circumstances the Master of the Rolls held that the plaintiffs were not entitled to call on a Court of Equity to interpose on their behalf "in order to obviate the consequences of their own misconduct." But the Master of the Rolls did not rest his judgment on that ground only. He dwelt at length on various considerations of more or less weight, and fortified or overlaid his argument by analogies more or less imperfect or incomplete. He pointed out that although the legal interest could not be transferred, there was "a mode of dealing with it which a Court of Equity considered tantamount to possession," that notice given to the legal depositary of the fund charged the trustees of the fund with responsibility towards the giver of the notice, and that such a precaution was always taken by diligent purchasers and incumbrancers, while omission to give such a notice enabled the assignor to come into the market to dispose of that which he had previously sold, and enabled him to obtain "a false and delusive credit." His view was that without such a notice assignees "do not do all that is necessary in order to make the thing belong to them in preference to all other persons, and they become responsible in some respects for the easily foreseen consequences of their negligence." His judgment was evidently much influenced by the opinions of the learned judges in the well-known case of *Ryall* v. *Rowles* (1), in which it was held that in order to avoid the operation of the Bankruptcy Act then in force, "in the case of a chose in action, you must do everything towards having possession that the subject admits." "The law of England," he said, "has always been that personal property passes by delivery of possession; and it is possession which determines the apparent ownership."

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(1) 3 Russ. 1.

(2) 3 Russ. 60.

The circumstances of *Loveridge* v. *Cooper* were much the same as those in *Dearle* v. *Hall* (2), and the decision was to the same effect.

The judgment of the Master of the Rolls in *Dearle* v. *Hall* and *Loveridge* v. *Cooper* (2) was affirmed by Lyndhurst L.C. He concurred with Sir T. Plumer in his opinion that the plaintiffs had no right to the assistance of a Court of Equity, and that having by their neglect enabled their assignor to commit the fraud which had given rise to the question, they could not come into that Court to avail themselves of the priority of their assignments in point of time. He observed that the case was not new in principle. "Where personal property is assigned," said his Lordship, "delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person who in fact is not the owner." He, too, founded his judgment, to some extent, on the case of *Ryall* v. *Rowles* (1), and the principle on which the Court there acted, holding that the grounds of the judgment in that case were "of general application." "In cases like the present," his Lordship observed, "the act of giving the trustee notice is in a certain degree taking possession of the fund. It is going as far towards equitable possession as it is possible to go, for after notice given the trustee of the fund becomes a trustee for the assignee who has given him notice."

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(1) 1 Ves. 348.

(2) 3 Russ. 1.

The case of *Cooper* v. *Fynmore* (2) was not cited or referred to in *Dearle* v. *Hall* (3). In the two cases the Master of the Rolls certainly took very different views of facts not substantially different. But there is nothing apparently in the law laid down in *Dearle* v. *Hall* (3) in conflict with the law laid down in *Cooper* v. *Fynmore* (2). The real difference between the two cases seems to be that conduct regarded as "mere neglect" in the one case was treated in the other as "gross negligence" and "constructive fraud."

The next case which has a bearing upon the question under consideration is the case of *Smith* v. *Smith* (4) in 1833 before the Court of Exchequer, presided over by Lord Lyndhurst, then Chief Baron, who delivered the judgment. There it was held that notice to one of several trustees of an assignment of a chose in action was sufficient to take the property out of the order and disposition of a person who afterwards became bankrupt.

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(1) 1 Ves. 348.
(2) 3 Russ. 60.
(3) 3 Russ. 1.
(4) 2 Cr. & M. 231.

The doctrine involved in *Dearle* v. *Hall* (1) received its final development in *Foster* v. *Cockerell* in the House of Lords (2), which was decided in 1835. In that case the Duke of Marlborough had conveyed freehold estates to trustees upon trust to sell and pay certain creditors of his son, the Marquis of Blandford, and subject thereto upon trust for the Duke for life, with remainder to the Marquis in fee. The trust for creditors was purely voluntary—an arrangement for the benefit and accommodation of the Marquis. The Marquis then granted certain annuities, charging them upon the estates, in which, under the conveyance, he took a vested remainder. He then mortgaged those estates without notice of the incumbrances which he had created. The Duke died, and the Marquis became owner in fee of the equity of redemption. The trustees sold the estates, and the mortgagee gave notice of his mortgage to the trustees five years after it was created. It does not appear when the estates were sold; but it is clear from the schedules to the master's report (3) that no part of the sale moneys which were dealt with in the suit was received by the trustees before the date of the notice. The master found that the annuitants had the first charge on the freehold estates. The mortgagee took exception to the report, and claimed to have the first charge upon the estates in question. It was held by the Master of the Rolls (Sir John Leach) that the mortgagee had priority over the annuitants by reason of the notice to the trustees. The Master of the Rolls considered that he had "a better equity because he" had "taken a protection against a subsequent incumbrance which the plaintiffs"—the annuitants—"had neglected to take." On appeal the judgment was affirmed. In moving the judgment in the House of Lords, Lyndhurst L.C., after referring to the cases of *Dearle* v. *Hall* and *Loveridge* v. *Cooper* (1), and stating that in those cases the Master of the Rolls "most distinctly recognised the principle that a party who first gives notice to the trustees of an incumbrance created in his favour over the trust property is entitled to a priority in equity," proceeded as follows: "Without adverting to the particular facts of those cases, the reason on which his Honour adopted that principle as the rule of his decision seems to have been, that if a contrary doctrine was allowed to prevail, it would enable a cestui que trust to commit a fraud, by enabling him to assign his interest, first to one, and then to a second incumbrancer, and perhaps, indeed, to a great many more; and these later incumbrancers would have no opportunity of ascertaining, by any communication with the trustees, whether or not there had been a prior assignment of the interest, on the security of which they were relying for provision for their claims. Another principle acted upon by the Master of the Rolls was that a party, till he gave notice to the trustees, had not done everything that was necessary to complete his title. I fully agree with this principle. In a case of this sort it is necessary that a party claiming advantage from a title should do everything that is requisite to complete that title before he sets up a claim in respect of it. The Master of the Rolls was also of opinion that the trustees themselves were entitled to notice on their own account, and that, till notice was given to the trustees, they did not, in fact, become trustees for the assignee. It was upon these distinct grounds that he laid it down as a general principle that in the case of an equitable assignment the party who was the earlier incumbrancer in point of date was not entitled to priority if he did not give notice; but such priority was justly to be conceded to a party giving notice to the trustees, although such party was, according to the date of the assignment, only a second incumbrancer." His Lordship added that, on appeal before him, after mature deliberation, he felt satisfied that the decision of the Master of the Rolls was a correct judgment. Coming to the present case, his opinion was that the principle on which the decisions in those cases proceeded applied directly to the present, and he moved that the judgment under appeal be affirmed. Lord Brougham, the only other law lord present, agreed.

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(1) 3 Russ. 1.

(2) 3 Cl. & F. 456.

(3) H. L. Printed Cases, 1835.

The case of *Foster* v. *Cockerell* (1) is perhaps a little difficult to understand, and the difficulty, I think, is not diminished by explanations that have been given by eminent judges. At first sight, it certainly looks like a contest between assignees of equitable interests in real estate, and not a contest between assignees of a chose in action. And, indeed, in the note of the case in Sir Edward Sugden's Treatise of the Law of Property, as administered by the House of Lords, page 678, it is summarized in language only appropriate to dealings with real estate. Shadwell V.C., explaining *Foster* v. *Cockerell* (1) in *Wiltshire* v. *Rabbits* (2), observes that when the notice was given by the mortgagee the surplus proceeds were in the hands of the trustees, and that the security of the mortgagee "at the time" was nothing but an assignment of a chose in action—a statement which, if it had been correct, would perhaps not have been material. No one, I should think, would contend that a third mortgagee could postpone the second by giving notice to the first mortgagee after he had sold the mortgaged estate. Wood V.C., in *Rooper* v. *Harrison* (3) says that "the property, though originally real estate, had been converted before the date of the security in question"—a statement which certainly would have been material if only it had been correct. It is not, however, necessary to pursue this subject further, because *Foster* v. *Cockerell* (1) has come to be treated as applying only to assignments of choses in action, or of such interests in real estate as can only reach the hands of the beneficiary or assignor in the shape of money. Though much of the reasoning in *Dearle* v. *Hall* (4) and *Foster* v. *Cockerell* (1) is applicable to assignments of equitable interests in real estate, it was explained by Shadwell V.C., in *Jones* v. *Jones* (5) in 1838, that the rule in *Dearle* v. *Hall* (4) has nothing to do with such cases. And that proposition has never since been questioned.

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(1) 3 Cl. & F. 456.

It may, perhaps, be doubted whether the views of Sir Thomas Plumer in *Dearle* v. *Hall* (4) were quite correctly appreciated in *Foster* v. *Cockerell* (1), which gives the go-by to all considerations founded upon the conduct of the parties. But however that may be, *Foster* v. *Cockerell* (1) unquestionably lays down that the rule known as the rule in *Dearle* v. *Hall* (4) is independent of any consideration of the conduct of the competing assignees, where the assignee second in date has no notice of the earlier assignment. Priority in such a case depends simply and solely on priority of notice.

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(1) 3 Cl. & F. 456.
(2) 14 Sim. at p. 78.
(3) 2 K. & J. at p. 100.
(4) 3 Russ. 1.
(5) 8 Sim. 633.

It is not necessary to go through the cases which followed *Foster* v. *Cockerell* (1). It is, however, to be observed that the rule laid down in *Smith* v. *Smith* (2), that in assignments of choses in action notice to one of several trustees is sufficient to take the property out of the order and disposition of a bankrupt has been applied in cases of competition between equitable assignees of personal estate, so far at any rate as to protect the priority of the earlier assignee, though it is perhaps difficult to see how an assignee who gives notice to one only of several trustees, or who gives no notice at all when one of the trustees happens to have notice aliunde, has done all in his power to lay hold of or arrest the fund assigned.

The learned counsel for the appellants invited your Lordships to define exactly the principle on which the doctrine of notice as established by the rule in *Dearle* v. *Hall* (3) depends. Speaking for myself, I think that would be a very hard task. I am not sure that the doctrine rests upon any very satisfactory principle. I am not sure that it has not been established at the expense of principles at least as important as any of those to which it has been referred.

The general principle applicable to all equitable titles is, I think, well expressed by Lord Cairns in *Shropshire Union Railways and Canal Company* v. *The Queen* (4): "A pre-existing equitable title," said Lord Cairns, "may be defeated by a supervening legal title obtained by transfer"—he was there speaking of an equitable title to shares. Then he goes on: "And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any

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(1) 3 Cl. & F. 456.

(2) 2 Cr. & M. 231.

(3) 3 Russ. 1.

(4) Law Rep. 7 E. & I. at p. 506.

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pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced."

In defence of the rule in *Dearle* v. *Hall* (1), it has been said that notice is necessary in order to "perfect" the title of the assignee—in order to "complete" his title. Those expressions have frequently been used; but they are, I venture to think, little more than mere phrases. Notice does not render the title perfect. Notice was not even a step in the title until it was made so by the decision in *Foster* v. *Cockerell* (2). Apart from the rule in *Dearle* v. *Hall* (1), an assignee of an equitable interest from a person capable of disposing of it has a perfect equitable title, though the title is no doubt subject to the infirmity which attaches to all equitable titles. And that infirmity is not and cannot be wholly cured or removed by notice to the trustees.

Then it has been said that notice "converts" the trustee of the fund into a trustee for the person who gives the notice. But that, again, is hardly accurate. The trustee of the fund is trustee for the persons entitled to the fund, whether he knows their names or not. The notice, no doubt, places him under a direct responsibility to the person who gives the notice. If he disregards the notice, he does so at his peril. But before notice given he is just as much a trustee for the persons rightfully entitled as he is after he receives the notice, though of course, in the absence of notice, he would be safe in paying away the fund to those who appear by the instrument constituting the trust, or by title properly deduced from them, to be the true owners.

Much of the reasoning in *Dearle* v. *Hall* (1) is founded upon *Ryall* v. *Rowles* (3). Indeed, as observed by Wigram V.C. in *Wilmot* v. *Pike* (4), it is impossible to read Sir Thomas Plumer's very elaborate judgment without seeing that his opinion as to the mode of transferring equitable interests in property not capable of actual delivery, "was borrowed entirely from the decisions in bankruptcy as to the acts which were necessary under the statute to take a chose in action out of the order and disposition of a bankrupt." The doctrine of reputed ownership is entirely the creature of statute, and applicable by statute in cases of bankruptcy only. I cannot help thinking that, in extending the doctrine to cases of equitable assignment of personal property where there is no bankruptcy (which is practically what was done in *Foster* v. *Cockerell* (1)), the Court has gone perilously near legislating. The inconvenience of such a course is obvious, and the result has been singular. The law relating to reputed ownership in bankruptcy has been altered from time to time. When *Dearle* v. *Hall* (2) was decided, it extended to all choses in action. Now it does not apply to choses in action at all, except to "debts due, or growing due, to the bankrupt in the course of his trade or business." But the rule in *Dearle* v. *Hall* (2), founded in great measure on the bankruptcy law as it existed sixty years ago, remains unaltered, and it is beyond the power of any Court to alter it.

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(1) 3 Russ. 1.

(2) 3 Cl. & F. 456.

(3) 1 Ves. 348.

(4) 5 Hare, at p. 19.

I am inclined to think that the rule in *Dearle* v. *Hall* (2) has on the whole produced at least as much injustice as it has prevented. It was argued in *Dearle* v. *Hall* (3) that notice to the trustees necessarily prevents fraud on the part of the assignor. "The trustees," said Mr. Sugden, "are converted into a register, and by applying to them every one who proposes to negotiate for the purchase of the fund, except in the very improbable event of the trustees incurring personal responsibility by lending themselves to the vendor's dishonest purposes, is enabled to ascertain whether any prior incumbrances exist which will prevail over the title that is to be conveyed to him." That argument was in substance adopted by the Court. But it is founded, I think, upon rather loose notions as to the duties of trustees which no doubt were prevalent at one time. There would be much force in the argument if it were the law (as Knight Bruce V.C. seems to have thought) that a trustee applied to for information by an intending mortgagee incurred liability by merely

(1) 3 Cl. & F. 456.
(2) 3 Russ. 1.
(3) 3 Russ. at p. 44.

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abstaining from answering: *Etty* v. *Bridges* (1); or if, as Wigram V.C. thought, notice of an incumbrance had "the effect of inquiry": *Meux* v. *Bell* (2); and indeed something more, for apparently, in his view, it imposed upon the trustee the duty of at once informing the person giving the notice of the existence of any prior incumbrance that might affect the fund. But in truth there is no duty of that kind cast upon trustees. If the rule in *Dearle* v. *Hall* (3) had never been invented it still would have been necessary for an equitable assignee, for his own protection, to give notice to the legal holders of the fund the subject of the assignment. A solicitor employed in such a transaction would still have incurred serious liability if he neglected so obvious a precaution. And I rather doubt whether the existence of the rule has led to notice being given in any case in which it would not have been given if the rule had been unknown.

My Lords, I have made these observations, not for the purpose of impugning the authority of the rule in *Dearle* v. *Hall* (3). The rule is settled law. But it seems to me that when your Lordships are asked to extend the rule to a case not already covered by authority, it is proper to inquire into the principles upon which the rule is said to be founded. For the reasons which I have already given, I do not think that those principles are so clear or so convincing that the rule ought to be extended to a new case.

There is one argument which I ought to notice before I conclude. It was said that if the mortgage had not been created until after Mr. Sharp's death and the mortgagees had then given notice to the surviving trustee, they would have gained priority. That may be so. But that is not this case. I take leave, however, to doubt whether the proposition on which the argument is founded can be treated as settled law. There is no authority for it that I know in this country but the case of *Timson* v. *Ramsbottom* (4) before Lord Langdale M.R. I do not think that that case can be regarded as one of much weight, for it was appealed, and after the appeal was opened the parties came to a compromise, and, moreover, it will be observed that his Lordship seems to have thought that the notice in that case was insufficient even during the lifetime of the person who received it, because he held that each one of the other holders of the fund being executors "had separate authority to receive and pay on account of the estate," and he thought that if they had no notice of the assignment they "might have made payment without incurring any liability on that account." As Westbury L.C. says in *Willes* v. *Greenhill* (1), "It is well established, whether rightly or wrongly, that upon assignments or mortgages of equitable interest in property held by trustees, the duty devolves upon the assignee or mortgagee to give to the trustees notice of the assignment or incumbrance." But it may be that when an assignee or mortgagee has once discharged that duty he has done all that the rule requires of him, and that for the rest the law holds as Lord Cairns lays it down, and that he is not, on a change of trustees, to be deprived of his pre-existing equitable title by the diligence or by the happy thought of a subsequent incumbrancer. Certainly, I can imagine nothing more inconvenient than that it should be possible to have a scramble for priorities on the appointment of new trustees. Nothing, I think, would be less likely to conduce to the security of equitable titles.

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(1) 2 Y. & C. at p. 493.
(2) 1 Hare, at p. 86.
(3) 3 Russ. 1.
(4) 2 Keen, 35.

My Lords, for these reasons I am also of opinion that the appeal should be dismissed with costs.

LORD HERSCHELL L.C.:—

My Lords, my noble and learned friend Lord Hannen desires me to say that he has read my judgment and that he entirely concurs in the motion I have made.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 15th June 1893.

Solicitors for appellants: *Robins, Hay & Co.*
Solicitors for respondents: *Fardell & Canning.*

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(1) 4 D. F. & J. at p. 150.

[HOUSE OF LORDS.]

H. L. (E.)
1893
July 20.

THE BALKIS CONSOLIDATED COMPANY, LIMITED . . . . APPELLANTS;

AND

FREDERICK TOMKINSON AND ANOTHER RESPONDENTS.

Estoppel—Company—Share Certificate—Certificate under Company's Seal—Companies Act 1862 (25 & 26 *Vict. c.* 89) *s.* 31—*Damages.*

P., the owner of numbered shares in a joint stock company, transferred them to persons who were registered in the company's books as proprietors of the shares. P. afterwards fraudulently executed a transfer of the shares for value to T., who sent the transfer to the company, and received from them a certificate under their common seal stating that he was the proprietor of the shares. T., acting bonâ fide on the faith of the certificate, sold the shares; but the company refused to register the purchaser as the proprietor, on the ground that after granting the certificate to T. they had discovered that he was not the real owner of the shares. T. then, to fulfil his contract with the purchaser, bought other shares in the market and sued the company for the price:—

Held, affirming the decision of the Court of Appeal ([1891] 2 Q. B. 614), that the company were estopped by their certificate from denying that T. was the proprietor of the shares, and that he was entitled to recover from the company the damages which he had in fact sustained owing to their refusal to register the purchaser.

APPEAL from an order of the Court of Appeal (1).

The following statement of the facts is taken from the judgment of Lord Herschell L.C.:—

This action was brought by the respondents to recover damages in respect of the refusal by the appellant company (who were the defendants in the action) to register the purchasers from the respondents of some shares in the appellant company.

Pollock B., who tried the action, gave judgment for the plaintiffs for £717 10*s*., and this judgment was affirmed by the Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.).

The respondents, who are stockbrokers, in December 1888 advanced to one Powter the sum of £250 by way of loan, on the faith of and in exchange for a transfer of 1000 shares in the appellant company, which Powter deposited with the respondents as security for such advances. The transfer was what is termed a certified transfer, that is to say, it bore upon its face, above the signature of the secretary of the company, these words: "Certificate lodged." There can be no doubt that the purpose of this certification is to give an assurance to the person taking the transfer that the transferor has deposited with the company a certificate shewing his right to transfer. The loan of £250 was paid off in January 1889, and further loans were afterwards made from time to time on the faith and security of this certified transfer.

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(1) [1891] 2 Q. B. 614.

In May 1889 the respondent Tomkinson, with the knowledge and sanction of Powter, inserted his own name (as representing his firm) in the transfer as transferee of the shares, and having executed the transfer lodged it at the office of the appellant company for registration.

On the 1st of July 1889 the appellant company, on the application of the respondents, issued to them a certificate signed by two of the directors, countersigned by the secretary, and sealed with the seal of the company, certifying that the respondent Tomkinson was the proprietor of the 1000 shares.

In August 1889 the balance due from Powter to the respondents was £193 14*s.* 6*d.*, for which they held the 1000 shares as security. Powter then instructed them to realize for the purpose of paying his debt. The respondents accordingly in that month sold the 1000 shares to various purchasers for the sum of £426 17*s.* 6*d.*, and for the purpose of completing such sales the respondents lodged with the appellants the certificate which had been issued in respect of the shares, together with transfers in favour of the respective purchasers thereof in order that they might be certified. This was done, and the transfers, with the certification signed by the secretary of the appellant company upon them, were returned to the respondents and handed by them to the various purchasers, who thereupon paid their purchase-money. Out of the £426 17*s.* 6*d.* thus received by the respondents they repaid themselves the balance of £193 14*s.* 6*d.*, which remained due as already mentioned, and, after paying to Powter a sum of £110, they retained the balance of

£123 3*s.*, Powter, who shortly afterwards absconded, being indebted to them to an amount largely in excess of that sum.

The appellant company refused to recognise the certified transfers, or to register the purchasers named therein as the holders of the shares. The respondents were consequently compelled, in accordance with the custom and rules of the Stock Exchange, to complete their contracts with the purchasers by purchasing and delivering to them 1000 other shares in the appellant company in the place of those named in the transfers. The market price of the shares having risen, the respondents were compelled to pay the sum of £717 10*s.* for such substituted shares, and it is the amount of this payment which they have been held entitled to recover.

From the evidence adduced at the trial it appeared that in December 1887 Powter was the registered proprietor of a large number of shares in the appellant company. In March 1888 the company certified a transfer of 5000 of these shares (of which the 1000 which Powter purported to transfer to the respondents formed part) to Maitland and Balfour. A note of this was indorsed by the appellant company on the certificate of Powter's shares which was in their possession. In January 1889 the company registered Balfour and Maitland as proprietors of the 5000 shares and gave them the usual certificate. It was under these circumstances that they refused to recognise the respondent Tomkinson as proprietor and to register his transferees.

March 14, 17, 20. *Finlay* Q.C. (*H. Sutton* with him) for the appellants:—

In giving the certification, viz. "Certificate lodged," all that the company represents is that it has from the proposed transferor a certificate under which the transferor shews title. The certification is only signed by the secretary and is no representation or warranty of title. A certification and a certificate are wholly different things. In any case, the respondents must bring the £426 into account and credit the transaction with that amount, so that the damages cannot exceed the difference between £717 and £426. The company had nothing to do with the division of ownership between the respondents and Powter; and if the respondents still had the money they would have to bring it into account. There is no estoppel, and the principle of *Bishop* v. *Balkis Consolidated Company* (1) applies. There can be no estoppel where, as here, the misrepresentation if true would not have given a good title. *In re Bahia and San Francisco Railway Company* (2) only explains and follows *Pickard* v. *Sears* (3), and neither that case nor *Hart* v. *Frontino, &c., Gold Mining Company* (4) applies to a case in which a company is asked to do an act beyond its powers. It was ultrà vires of the appellants to issue shares beyond the authorized capital; and there is nothing in these cases to make it intrà vires. The same principle was applied by Parke B. to the case of a married woman in *Cannam* v. *Farmer* (5). Her incapacity to contract was not removed by her misrepresentation and there was no estoppel. *Shaw* v. *Port Philip Company* (6) was overruled by *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (7), in which Bowen L.J. (at p. 717) states the law to be that a principal cannot be liable for the unauthorized and fraudulent act of a servant or agent committed for the latter's own private ends. The New York Superior Court, in *Mechanics Bank* v. *New York and New Haven Railroad Company* (8), in a precisely similar case where the agent of the company issued fraudulent certificates, held that the company was not liable.

Buckley Q.C. on the same side:—

The respondents sued, not for the advances made to Powter, but for the value of the shares. The question therefore arises, What is the effect of a certificate? The company does not warrant a title by a certificate; the certificate only shews that the company is satisfied with the evidence of title. It thus becames primâ facie evidence to others of title: to the holder it only tells what he already knows. No doubt the company is bound to see that the register is correct; but it does not by the certificate warrant that there is not a forged signature to the transfer. The *Bahia Case* (1) only establishes estoppel in favour of a third party and does not apply to the transferor or original holder; with respect to the original holder the certificate is only a record of fact that he is entered on the register. The present case is governed by *Simm* v. *Anglo-American Telegraph Company* (2). There was no estoppel in that case in favour of transferees under a forged transfer. At most the company innocently made a misstatement of fact, and the only action which would lie would be one of deceit, and the case would be governed by *Derry* v. *Peek* (3). The company refused to register Tomkinson's transferees, and for this no more than nominal damages could be recovered. The vendor of shares only contracts to execute a valid transfer; he does not undertake to procure registration.

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(1) 25 Q. B. D. 77, 512.
(2) Law Rep. 3 Q. B. 584.
(3) 6 Ad. & E. 469.
(4) Law Rep. 5 Ex. 111.
(5) 3 Ex. 698.
(6) 13 Q. B. D. 103.
(7) 18 Q. B. D. 714.
(8) 4 Duer (11 N. Y. Sup. Ct.) 480.

With respect to estoppel, you must choose your remedy. You cannot both rely on estoppel, and also on the real facts. In *Scarf* v. *Jardine* (4) Lord Selborne L.C. says (at p. 350): "The two principles are not capable of being brought into play together; you cannot at once rely upon estoppel and set up the facts." There is no question of novation. Suppose Tomkinson had never sold and had demanded registration. What would have been the damages in case of refusal to register? They would have been nil. You could in such a case keep your shares in the name of your vendor as trustee for you. The value of your names being on the register is nothing: *Skinner* v. *City of London Marine Insurance Corporation* (5); *London Founders Association* v. *Clarke* (6). If the respondents rely on estoppel the damages are the same as on the refusal to register a real owner, i.e. as the authorities cited shew, nominal. The whole share capital of the company had been issued; there was no power to issue new shares. The company could not be liable for not acting ultrà vires. Thus there is no room for estoppel—as you cannot be bound by estoppel to that to which you could not have been bound by contract. Where there is no power to

(1) Law Rep. 3 Q. B. 584.
(2) 5 Q. B. D. 188.
(3) 14 App. Cas. 337.
(4) 7 App. Cas. 345.
(5) 14 Q. B. D. 882.
(6) 20 Q. B. D. 576.

contract there can be no estoppel: *Fairtitle* v. *Gilbert* (1); *Ex parte Watson* (2).

[Lord Herschell L.C. referred to *Wenlock* v. *River Dee Company* (3).]

Then if estoppel does not apply there can be no liability in damages: *Ashbury Railway Carriage and Iron Company* v. *Riche* (4). There can be no remedy for the non-issue of stock which the company has no power to issue. The effect of allowing such damages where there was no power to contract would be indirectly to extend the powers of a company and make a limited company unlimited. See Lord Cairns L.C.'s observations in *Ashbury Company* v. *Riche* (5) and Comstock J.'s judgment in *Mechanics Bank* v. *New York and New Haven Railroad Company* (6). The judgment of Comstock J. in the American case applies both to certificate and certification. Next let it be granted that the appellants are liable in estoppel. The principle is that a man cannot profit by the estoppel which he sets up. His remedy is to be placed in exactly the same position as if the untrue statement had never been made. The damages claimed are £717, but the respondents were not the holders of shares and ought not to be so considered now. They received £426 on the representation that they were shareholders and they must bring that in to the appellants' credit. The principle of estoppel is not that the parties are put in the same position as if the assumed state of facts were true, but in the position in which they were before the misstatement was made. If again, the respondents rely on the certification on which they advanced money, as they have been repaid that money except £123, that sum represents the damages; and if the damages are for non-registration they are merely nominal.

Reid Q.C. (*Hollams* with him) for the respondents:—

By their certificate issued on the 1st of July 1889 to Tomkinson the company represented to him that he was the owner of 1000

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(1) 2 T. R. 169.

(2) 21 Q. B. D. 301.

(3) 10 App. Cas. 354.

(4) Law Rep. 7 H. L. 653.

(5) Law Rep. 7 H. L. at p. 672.

(6) 4 Duer. (11 N. Y. Sup. Ct.) 488.

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shares which he might sell in the market to persons who desired to become the registered holders, and they are estopped from denying the truth of the representation, and are liable to make good the loss sustained. What is the true meaning of certifying the transfer and issuing the certificate? The certification means that the transfer is brought to the secretary and is in order: that there is nothing which would vitiate the transaction. The certificate shews that the holder is the registered owner. The respondents first relied on the certification and then got the certificate which is a confirmation of the certification. They rely on sect. 35 of the Act of 1862.

[LORD MACNAGHTEN referred to *Société Générale de Paris* v. *Walker* (1).]

But see *Shropshire Union Railways and Canal Company* v. *Reg.* (2) and sect. 30 of the Act of 1862. If the company had notice of circumstances which made it a fraud for Powter to transfer they must act on the notice. They cannot issue several certifications of the same shares. The certificate is a representation that the person named is on the register. The appellants' argument against estoppel is sufficiently answered by *In re Bahia, &c., Company* (3) and *Hart* v. *Frontino, &c., Company* (4). On the question of damages it is clear that they must be the amount which the respondents had to pay in order to procure the shares.

Finlay Q.C. in reply, cited *Burkinshaw* v. *Nicolls* (5). The *Bahia Case* (3) was wrongly decided, and even if right does not apply except in favour of the original grantee of the certificate. The certificate is only primâ facie evidence and was never intended to make a title indefeasible. The company cannot be made liable for mistake or defect of memory on the part of a clerk.

The House took time for consideration.

(1) 11 App. Cas. 20.
(2) Law Rep. 7 H. L. 496.
(3) Law Rep. 3 Q. B. 584.
(4) Law Rep. 5 Ex. 111.
(5) 3 App. Cas. 1004.

July 20. Lord Herschell L.C. (after stating the facts given above) proceeded as follows:—

My Lords, it was contended for the respondents that the certificate which the respondent Tomkinson received from the appellant company was given to him for the purpose of being used by him as evidence of his title to the shares; that on the faith of this he entered into contracts of sale which he was bound to fulfil; that the appellant company were under these circumstances estopped from denying that he was the proprietor of the shares, and that, having refused to register the purchasers and transferees from him on the ground that he was not the proprietor of them, they were liable to make good to him the loss he had sustained in consequence.

It was held by the Court of Queen's Bench, in *In re Bahia and San Francisco Railway Company* (1), that such an estoppel might arise where a certificate was issued stating that the person named in it was the registered holder of certain shares in the company. The persons named in the certificate of the Bahia and San Francisco Railway Company having sold to a purchaser who was registered as holder, his name was afterwards removed on its being discovered that the transfer to the persons named in the certificate was a forgery. The Court held that the giving of the certificate amounted to a statement by the company, intended by them to be acted upon by the purchasers of shares in the market, that the persons certified as the holders were entitled to the shares; and that the purchasers having acted on that statement by the company, they were estopped from denying its truth and liable to pay as damages the value of the shares.

Blackburn J., in the course of his judgment, remarked that when joint stock companies were established it was a great object that the shares should be capable of being easily transferred; that the Legislature had accordingly provided for the keeping of a register of the members, in order to keep which the company must alter the register whenever there was a transfer of its shares; and the learned judge drew attention to sect. 31 of the Companies Act 1862, which provides that a company may give certificates, and that these shall be primâ facie evidence of the title of the person named to the shares specified, and pointed out that by granting the certificate the company make a statement that they have transferred the shares specified to the person named in it, and that he is the holder of the shares; that if the company have been deceived and the statement is not true, they may not be guilty of negligence, but they and no one else had power to inquire into the matter. The learned judge expressed the opinion that it was the intention of the Legislature that these certificates should be documents on which buyers might safely act, and continued thus: "It is quite clear that a statement of a fact was made by the company, on which the company, at the very least, knew that persons wanting to purchase shares might act. And the claimants having bonâ fide acted upon that statement, and suffered damage, can they recover from the company? I think they can on the principle enunciated in *Freeman* v. *Cooke* (1)."

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(1) Law Rep. 3 Q. B. 584.

The decision in the *Bahia and San Francisco Railway Case* (2) was followed under somewhat different circumstances by the Court of Exchequer in *Hart* v. *Frontino and Bolivia South American Gold Mining Company* (3). The plaintiff in that action bought and paid for shares in the defendant company, and received duly executed transfers and share certificates, which certified that the person named in the register of shareholders was the proprietor of five shares numbered, &c. The seller of the shares being afterwards compelled to pay a call upon them, demanded repayment from the plaintiff, who required to have the transfer completed by registration. His name was accordingly entered on the register, and he received from the company a certificate that he was the proprietor of the shares. On the faith of this certificate he repaid the seller the amount of the call. The company having discovered that the shares had been sold by a previous owner by a duly executed transfer to another person, removed the plaintiff's name from the register and inserted the name of that person. It was held that by the registration of the plaintiff and the delivery to him of the certificate, followed by the payment by him of the call, the defendants were estopped from denying his title to the shares and were liable to pay for their value.

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(1) 2 Ex. 654.

(2) Law Rep. 3 Q. B. 584.

(3) Law Rep. 5 Ex. 111.

The learned counsel for the appellants impeached these decisions, as they were entitled to do in your Lordships' House, and contended that they ought to be overruled.

After carefully considering the able arguments urged at the Bar, I have no hesitation in expressing my concurrence in the law laid down by the Court of Queen's Bench in *In re Bahia and San Francisco Railway Company* (1). The reasoning of Blackburn J. in pronouncing judgment in that case appears to me to be sound and in accordance with the law, and I think it would be very mischievous to cast any doubt on the authority of that case.

The appellants argued, however, and correctly, that the present case is distinguishable from that in the Queen's Bench, inasmuch as it is not the purchasers who are seeking to render the company liable by way of estoppel, but the vendor of the shares, who himself received the certificate from the company. Does that, in the circumstances which your Lordships have to consider, make any difference? If the company must have known, as was said in the *Bahia and San Francisco Railway Case* (1), that persons wanting to purchase shares might act upon the statement of fact contained in the certificate, it must equally have been within the contemplation of the company that a person receiving the certificate from them might on the faith of it enter into a contract to sell the shares. The plaintiff did enter into such a contract, and thereby altered his position by rendering himself liable to the persons with whom he contracted to sell the shares. All the elements necessary to create an estoppel would appear, therefore, to be present. The appellants, however, relied upon the decision in *Simm* v. *Anglo-American Telegraph Company* (2) as shewing that one who receives from a company a certificate that he is the proprietor of shares therein is not in the same position as regards his rights by estoppel against the company as a transferee from him would be.

In that case Burge, who was the buyer of stock in the defendant company, received in pursuance of his purchase a transfer of the stock purporting to be executed by Coates, who was the registered owner of stock to the amount purchased. The transfer was, in fact, forged by a clerk in Coates's employ. Burge having borrowed money from a bank, the stock was transferred to Ingelow as trustee for the bank, and the company registered Ingelow as the owner, and issued a certificate accordingly. The advance having been repaid by Burge, the bank's trustee became trustee for him. The company having discovered the forgery, and refused to recognise Ingelow as the owner of the shares, an action was brought by Burge and Ingelow to compel the company to recognise their title. It was held by the Court of Appeal that they had no title by estoppel as against the company. The grounds for the decision appear to have been two-fold: in the first place, that Burge had not altered his position by reason of the statement in the certificate; in the next place, that he had himself by producing to them a forged transfer induced the company to insert the name of his nominee as the proprietor of the stock.

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(1) Law Rep. 3 Q. B. 584.

(2) 5 Q. B. D. 188.

Neither of these grounds applies in the case before your Lordships. I have already shewn that the plaintiffs did alter their position by entering into a contract which imposed liability upon them, and they did not in any way mislead the company into registering the plaintiff Tomkinson as a shareholder and giving the certificate relied on. The company had certified the transfer to the plaintiffs—that is, they had stated in effect that there was in their possession a certificate shewing the title of Powter to make the transfer to them; they knew, and the plaintiffs did not, that they had already certified a transfer of these very shares from Powter to Maitland and Balfour, and that the certificate referred to in their indorsement "Certificate lodged" bore on the face of it a statement shewing that this was the case. I can see nothing, therefore, in the circumstances under which the plaintiffs obtained the certificate to deprive them of the right to claim by way of estoppel against the company.

The case of the *Directors, &c., of the Ashbury Railway Carriage and Iron Company* v. *Riche* (1), which was much pressed upon

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(1) Law Rep. 7 H. L. 653.

Lord Herschell, L.C.

your Lordships in the argument for the appellants, appears to me to have no bearing on the question at issue between the parties to this appeal. The argument was put, as I understand, in this way: The company, it was said, are only authorized to issue a limited number of shares; and to hold it liable by estoppel, as is sought to be done in this case, to a person who is not the proprietor of any of those shares, would in effect enable them to contract a liability in respect of shares beyond their authorized issue. I do not think this argument is a sound one. A person to whom the company is liable by estoppel to pay damages for refusing to register his transfer does not by reason thereof become a shareholder. Indeed the very title by estoppel implies that he is not one. It has never been laid down and is manifestly not the law that a company is not authorized to employ its funds in paying damages for a wrong done, and if his right by estoppel is established, the company have as much committed a wrong by refusing to register as shareholder the person whose title they deny as if his title to be registered had in fact been a good one.

It remains to consider whether the plaintiffs are entitled to recover as damages the sum which they have had to pay in order to purchase shares to enable them to carry out their contract. It is certain that this expenditure became necessary because, and only because, the company refused to register the purchasers. But it is said that the sum thus expended is nevertheless not recoverable. It was argued that in respect of the refusal to register a transfer from him a shareholder can recover nominal damages only. This may, no doubt, be so in some cases. In my opinion it cannot be laid down as a proposition applicable to all cases that a person claiming by estoppel against a company is limited to nominal damages only in respect of the refusal to register a transferee from him.

Again, it was said that the company have a certain discretion allowed them, and were not bound to register every person to whom a shareholder might choose to transfer his shares. This is also true; but in the present case the refusal was not based on any exception taken to the proposed transferees; it was grounded upon a denial of the title of the intending transferor, to whom a certificate of his proprietorship of the shares had been issued by the company. In such a case I can see no good reason why, if he can establish an estoppel against the company, he should not be entitled to recover the damages which he has in fact sustained owing to the refusal of the company to register. But it is contended that some deduction ought to be made from the sum of £717 10*s.* in respect of the amount received from the purchasers of the shares. I agree with the Court below in seeing no ground for such a deduction. If the company had registered the purchasers of the shares (which in assessing the damages it must be taken as against them they were bound to do) these moneys would equally have been received, and the £717 10*s.* would not have been expended.

My Lords, for the reasons I have given, I think the judgment appealed from ought to be affirmed, and this appeal dismissed with costs.

LORD MACNAGHTEN :—

My Lords, in August 1889 the respondent Tomkinson, who carried on the business of a stockbroker in partnership with the other respondent, Price, under the firm of Tomkinson & Price, sold in the market 1000 £1 shares fully paid up in the Balkis Consolidated Company Limited. At the time Tomkinson believed himself to be the registered owner of 1000 shares in the company, Nos. 386, 667—387, 666, and to be the mortgagee of those shares on behalf of his firm; and he had in his possession a certificate dated the 1st of July 1889 under the seal of the company, duly authenticated, stating that he Frederick Tomkinson was the proprietor of the shares in question. The sale was made by the direction of one William Powter, who was believed by Tomkinson to be the immediate transferor of the shares, and to be entitled thereto subject to the charge in favour of his firm.

In due course Tomkinson lodged with the company the certificate of the 1st of July 1889 and furnished the several purchasers from him with transfers purporting to be duly certificated on behalf of the company. Thereupon, in accordance with the rules of the Stock Exchange, the purchase-money, amounting in the aggregate to £426 17*s.* 6*d.*, was paid to Tomkinson & Price. They dealt with it in the following manner: they deducted £193 14*s.* 6*d.* in satisfaction of the amount due to them from Powter on their security, they paid Powter £110, and they retained the balance of £123 3*s.* on Powter's account, but shortly afterwards they applied it properly, as it seems, in discharge of a debt which became due to them from Powter on another account.

The several purchasers of the 1000 shares in due course lodged their respective transfers with the company. After some little delay the transfers were returned on the ground that Tomkinson was not the registered proprietor of the shares.

The purchasers then called on Tomkinson & Price to fulfil their contract. The shares had risen in the interval, and they had to buy 1000 shares in the market at the cost of £717 10*s.*

The company refused to indemnify the respondents against this outlay, and the present action was then brought.

It appeared at the trial that the shares which Powter pretended to transfer to Tomkinson had at one time belonged to him. But he had parted with them, and other persons were on the register in succession to Powter at the time when Tomkinson sent in his transfer to the company and received from them the certificate of the 1st of July 1889. It also appeared that in regard to these and other shares in the company Powter had pursued a course of systematic fraud which he was enabled for a time to carry on without detection by the help of some officials in the company's service who were in collusion with him. But it was established beyond question and it is admitted by the appellants that Tomkinson and his firm acted throughout in good faith and had no reason to suspect any want of good faith on the part of Powter.

Under these circumstances Pollock B. and the Court of Appeal held the company liable on the ground that they were estopped by the certificate of the 1st of July 1889 from denying that Tomkinson was the registered proprietor of the 1000 shares in question.

The general principle of law relating to estoppel by representation cannot be questioned. It is, as Lord Cranworth observed in the case of *Jorden* v. *Money* (1), before this House, a principle of universal application, that if a person makes a false representation to another and that other acts upon that false representation the person who has made it shall not afterwards be allowed to set up that what he said was false and to assert the real truth in place of the falsehood which has so misled the other. Then, after referring to some cases on the subject, his Lordship goes on to say: "I think the principle may be carried much further, because I think it is not necessary that the party making the representation should know that it was false, no fraud need have been intended at the time. But if the party has unwittingly misled another you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying."

Now there is no doubt, I think, that in this case the company must be taken to have known that the certificate was required by Tomkinson or his firm for the purpose of being acted upon. In fact, when the certificate was sent back to the company and Tomkinson's transfers were sent in for certification, the company had express notice that the certificate was being acted upon. There is no difficulty in this respect.

Nor is there, I think, any difficulty created by the circumstance that all the shares of the company were issued, and that the company could not have gone into the market to buy its own shares. The company are not asked to make good their representations by transferring shares to Tomkinson. They are called upon to pay damages in order to compensate Tomkinson for loss to which he has been put by reason of their misrepresentation.

Nor do I think that it is any answer to Tomkinson's claim to say that he had a statutory right to inspect the register, and that if he had taken the trouble to do so he would have found out that Powter had no shares to transfer; and I agree as to the measure of damages.

The only difficulty that I have felt arises from the connection between Powter and Tomkinson in the relation, or assumed relation, of mortgagor and mortgagee, and from the fact that

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(1) 5 H. L. Cas. at pp. 210, 212.

Powter, acting or pretending to act on Tomkinson's behalf as well as on his own account, was instrumental in procuring the certificate of the 1st of July 1889, and that Tomkinson was an active though unconscious instrument of Powter's fraud. Whether under such circumstances a person ought to be permitted to rely upon a misrepresentation innocently made to which he has in a sense and to a certain extent contributed, is I think a matter not unworthy of consideration. The point, however, was not argued; the evidence bearing upon it was not sifted, and the attention of the learned counsel for the respondents was not called to it. It would not, therefore, be right for me to say more than that in my opinion there is nothing to prejudice the question, if it should ever be raised, even under circumstances similar to those which have occurred in the present case. With this reservation, I concur in the motion that has been proposed.

LORD FIELD:—

My Lords, I concur with my noble and learned friends in the conclusion at which they have arrived, that this appeal must be dismissed.

It seems to me to be impossible, for the reasons which my noble and learned friend the Lord Chancellor has given, after the repeated and hitherto I think substantially unquestioned decisions which he has so fully dealt with, not to hold that a transferee of shares, who has parted with the consideration money for the transfer upon the faith of and in exchange for a certificate of proprietorship issued by a company under their seal, is entitled to rely upon the truth of the statement contained in it, and that the company are precluded, in any action brought by him in which that statement is material, from denying the truth of it and setting up a want of title in the person whom they have certified as owner. I agree also in thinking that a transferor who has entered into a contract to deliver valid shares upon the faith of a certificate of his ownership issued to him by the company, is in the same position. The reasoning upon which the cases referred to proceed seems to me to be sound, and to be quite as applicable in the one case as in the other.

I can, however, well understand that there may be cases in which, the untruth of the statement not depending upon any fact within the knowledge of the company as to which they have means of knowledge which they reasonably ought to have recourse to, and the person setting up the estoppel having equal means of knowledge, and having applied for and obtained the certificate upon an alleged transfer—I say there may be such cases in which no such estoppel may exist. Such a state of things existed in the case of *Simm* v. *Anglo-American Telegraph Company* (1), which has already been referred to. There the untruth of the certificate consisted in the fact that the signature to the transfer sent in for registration, and which purported to be that of the person actually registered as holder in the company's register, had been forged; and as Brett L.J. observed that was a fact which lay as much within the knowledge of the applicant as of the company, and the certificate, as he says, did not contain a statement of facts which must have been known to the company, but which were not known to the person to whom the representation was made.

That case differs, therefore, widely from the present. Here the falsity of the representation depended upon the fact that Powter, the proposed transferor, was not, and had not been for some months to the knowledge of the company, the registered owner of the shares which he purported to transfer, they having in the January preceding not only received a transfer from him to Maitland and Balfour and entered it in their transfer book, but having actually registered Maitland and Balfour for the whole of the shares in question, and afterwards other persons for some of them. In *Simm's Case* (1), as in the present, no fraud was imputed to the applicants, and the learned judge who tried it also absolved all parties from negligence in the sense of want of reasonable care. But in the present case I cannot acquit the appellants of a certain amount of negligence or want of due care, for all that was requisite for the defect to have been ascertained was a reference to the share register, the duty of keeping which is thrown upon the company by statute.

In *Simm's Case* (1) the Court of Appeal held, and I agree with them, that there was no duty upon the company to inquire of a registered holder whether the signature was genuine, although it was the practice of the company to do so. But I do think that before affixing the seal of the company and the signature of the directors to a representation which they know the applicant requires as evidence of title upon which he may go into the market and make contracts of sale according to the regulations of the Stock Exchange, involving the duty of making a complete delivery of genuine shares, it is at the least the duty of a company to ascertain by reference to their own register whether the proposed transferor appears to be the holder of the shares which he purports to transfer. My Lords, it was in evidence that it was the practice for companies so to do. In sending in a transfer to a company for registration it does not appear to me that the applicants give any warranty, or even make a material representation to the company, that the transferor is the registered holder of the shares. That is a fact of which in the ordinary course of business at the time when the transferee would part with his money he would not only have no knowledge, but no reasonable means of knowledge; whereas the company, who are under an obligation to grant or refuse the certificate, with ample time to refer to their own documents of title, have all the means of knowledge in their own office. That is a duty which I think they owe to a person who is desirous of becoming a member of their body, and wishes to ascertain whether he may safely rely upon his admission as such, and to be fortified with an assurance by the company to that effect.

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(1) 5 Q. B. D. 188.

It is, of course, true in this case, as in that of Simm, that the respondents were the persons who sent in the transfer to the appellants for registration and certificate; and in that sense and to that extent they may be said to have induced its issue. But I cannot come to the conclusion that in so doing they in any way induced the appellants to believe that Powter was the registered holder, or that the appellants were induced by it to make the false representation contained in the certificate. The respondents' relations with Powter were no doubt those of principal and agent; but I can see no substantial ground for inferring that those relations in any way made the respondents responsible for Powter's frauds. No fraud on their part was imputed to them, and that was expressly negatived by the learned judge who tried the case. And to hold that a proposed transferee, who innocently sends in a transfer from a person appearing upon a certificate to be the registered owner, is deprived of the value of the assurance contained in the certificate, would I think very much tend to reduce the value of what seems to me to be a very important link in a man's title.

There is also no doubt that in the present case the sales which were made by the respondents upon the faith of the certificate were made by the order of Powter, and the letters of the 17th of May might have given rise to a question as to how far the respondents were acting with and for Powter in sending in the transfer, though innocent of any fraud. But the respondent Tomkinson was examined as a witness at the hearing, and no question in fact was put to him making any such suggestion, nor as I understand has any suggestion to that effect been made at your Lordships' Bar.

My Lords, I arrive, therefore, at the result that the judgment of the Court of Appeal must be affirmed, as I am unable to come to the conclusion that there was anything in the conduct of the respondents to bring them within any authority or principle of equity which ought to prevent them from relying upon the estoppel which they set up, and the maintenance of which in general in the case of sellers as well as buyers is I think in conformity with principles of equity and most essential to the conduct of the vast transactions in shares of registered companies which daily take place in this country.

If, therefore, the estoppel exists, as I think it does, how does it operate in favour of the respondents? The breach of duty which they substantially allege is a refusal to register their transferees under circumstances which, as I hold, preclude the appellants from denying the respondents' ownership of the shares. If the latter had been such proprietors, they would have had a right to require the appellants so to register, and the refusal to do so was, therefore, as against the respondents upon the assumption of fact which the appellants were precluded from denying, in my opinion an actionable wrong in respect of which the respondents are entitled to recover damages. The measure of those damages is I think the sum which they have had to pay to enable them to carry out the contracts into which they entered upon the faith of the assurance given to them by the certificate. The moneys which they received upon their own sales were not in any sense received to the use of the appellants. Upon the assumption which the estoppel creates as against the appellants that the certificate was well founded, that money was properly received by the respondents, and I do not see how the appellants can recover it back in the shape of deduction from the £717 10*s.* which the respondents would not have had to pay in that view of the case.

It was argued that the appellants were not liable because as a corporation they could not exceed their powers by registering stock which was already registered in the names of other proprietors; and if this had been an application to compel them to do so or to purchase other stock of an equal amount, that might have been so. But this is an action to recover damages for a wrong to which no such principle can apply any more than other breaches of contract or duty of which they might have been guilty.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 20th July 1893.

Solicitors for appellants: *Stretton, Hilliard, Dale, & Newman.*
Solicitors for respondents: *Hollams, Sons, Coward, & Hawksley.*

[HOUSE OF LORDS.]

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1893
July 27.

THE METROPOLITAN RAILWAY COMPANY . . . . APPELLANTS;

AND

FOWLER AND OTHERS . . . . RESPONDENTS.

Revenue—Land Tax—Liability to Assessment—Interest in Land—Railway Tunnel—"Hereditament"—38 *Geo.* 3, *c.* 5, *s.* 4.

A special Act authorized the Metropolitan Railway Company to construct an underground railway, and provided that with respect to lands under a highway the company should not be required wholly to take such lands, but might appropriate and use the subsoil and under-surface. Under this Act the company constructed a tunnel under a highway for the purposes of the railway:—

Held (affirming the decision of the Court of Appeal, [1892] 1 Q. B. 165), that upon the true construction of their special Act the company had with respect to the tunnel an interest in land and not merely an easement; that the tunnel was a "hereditament" within the meaning of 38 Geo. 3, c. 5, s. 4, and that the company was in respect thereof chargeable with the land tax imposed by that statute.

APPEAL from an order of the Court of Appeal.

In an action brought by the appellant company against the respondents, as Commissioners of Land Tax for the City of London, a special case was stated raising the question whether the appellant company were liable to be assessed to land tax in respect of a portion of their railway, viz., a tunnel under the highway of the Crescent, Minories, in the City of London. The material clauses of the appellant company's special Act and the circumstances of the case are fully set out in the report of the decision of the Court of Appeal (1) and are also stated in the judgment of Lord Herschell L.C. The Court of Appeal (Lord Esher M.R. and Kay L.J., Lopes L.J. dissenting), affirming the decision of the Queen's Bench Division (Cave J., Vaughan Williams J. dissenting), held that the company were liable to be assessed.

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(1) [1892] 1 Q. B. 165.

July 10, 11. Sir *R. E. Webster* Q.C. and *Lawson Walton* Q.C. (*W. Baugh Allen* with them) for the appellants:—

The appellants have only an easement; they have no such interest in the land as is included in 38 Geo. 3, c. 5. The amount to be raised under that Act is a fixed sum, and the only effect of taxing this part of the appellants' undertaking would be to lighten the burdens of others. By the City Lines Extensions Act 1879 s. 16, under which this tunnel was made, the appellants are authorized to "appropriate and use" without wholly taking the subsoil, and may purchase any cellar, vault or construction without being deemed purchasers of a part of a house or building. This permission to use the subsoil—which is all that the appellants have exercised—is in the nature of an easement. The ownership of the surface is in the road authority. Cave J. suggested that it was the "tolls" of the appellants which should be taxed. But it is stated in the special case that no tolls or yearly profits have been received in respect of the tunnel otherwise than by means of the railway fares. If the street was once private property—as no doubt it was—it is impossible to say whether or not the land tax has been redeemed. The word "appropriate" does not imply property in the company, and land tax was levied only on the surface. In *Chelsea Waterworks Company* v. *Bowley* (1) a water company which had pipes laid down under the street was held to be not assessable. In *Reg.* v. *East London Waterworks Company* (2) the same Court pointed out the distinction between land tax and a paving rate, and held the water company liable as occupiers of land for a rate in respect of their mains, pipes and other apparatus. In *East London Waterworks Company* v. *Trustees for Mile End Old Town* (3) the company was held not assessable for their pipes, &c., under a local Act by which rates were laid upon persons "who inhabit, hold, use, &c., messuages, tenements . . . . or hereditaments." No governing principle can be deduced from the decisions; but in practice the land tax has been levied only on the surface—except in the case of quarries, mines &c. which are mentioned in the Land Tax Act—the term "surface" including sloping or vertical, as well as horizontal, surface. Redemption of the tax upon the land would redeem not only the surface but also the subsoil, except in the case of mines, &c. The company's interest is only an easement; see sect. 17 of its Act, in which this right to use the subsoil is referred to as an easement.

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(1) 17 Q. B. 358; more fully reported in 20 L. J. (Q.B.) 520.

(2) 18 Q. B. 705.

(3) 17 Q. B. 512.

[LORD ASHBOURNE:—A railway tunnel may be used for many subsidiary purposes, e.g. advertisements.]

That would not make the interest the less an easement. Sewers were for many years under the Public Health Acts regarded as easements; and the large sewers are entered and cleansed by the servants of the county council or other authority. In tramway cases it has been held that the tramway companies have no exclusive occupation of the street or even of the rails. It is true that a bridge, erected over land which had been redeemed from land tax, was held liable to land tax in respect of the tolls: *Charing Cross Bridge Company* v. *Mitchell* (1); but that case and *Reg.* v. *Midland Railway Company* (2), in which a railway was rated for the purpose of a local Act, have no bearing on the present case. On the other hand, in *New River Company* v. *Land Tax Commissioners for Hertford* (3) the company was held not to be assessable for springs discovered subsequently to the redemption of the land from land tax. In case of damage to adjacent property, which would make a claim for diminishing the land tax payable on the injured property, compensation is provided by sect. 17 of the special Act. There is no provision anywhere for the readjustment of the land tax.

Finlay Q.C. and *T. E. Scrutton* (*Thomas Hewitt* with them) for the respondents:—

If the *Chelsea Waterworks Company* v. *Bowley* (4) supports the contention of the appellants it ought to be overruled. But it is clear that the Court there thought the water company's right was simply to lay a chattel under the soil. Laying a pipe underground is a widely different thing from constructing a building. If a solid building such as an ancient aqueduct were raised, it would be regarded in a different light from a mere pipe; and

(1) 4 E. & B. 549.
(2) 4 E. & B. 958.
(3) 2 H. & N. 129.
(4) 17 Q. B. 358; 20 L. J. (Q.B.) 520.

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such an erection would be in the same position as this railway tunnel, which is an underground building with exclusive enjoyment, and therefore an interest in land, and taxable accordingly. The fact that the appellants acquired the right of taking the land under the street without payment raises no inference of immunity from taxation. All that is implied in sect. 17, on which the appellants rely, is that even if only an easement is acquired the appellants shall still be liable to make compensation for damage under the 68th section of the Lands Clauses Act. The word "appropriate" in sect. 16 can only mean make their own in the same sense in which their buildings and offices are their own. The appellants might build a station. Could that be called an easement? In the *Charing Cross Case* (1) the bridge was held to be an entirely new hereditament. In *Reilly* v. *Booth* (2) Cotton L.J. at p. 22 described the grant of the exclusive use of a gateway and passage as property and not easement. But even if this were only an easement (which it is not), it would not be exempt from assessment. Eight miles out of twelve of the appellants' railway are tunnel, and this tunnel is used for many purposes, such as advertisements. The Land Tax Act includes incorporeal hereditaments, "tithes, tolls, annuities . . . . and all hereditaments of what nature or kind soever." "Appropriate" in the appellants' Act is an apt term for the grant of an easement; and "happening and arising," words used in the Land Tax Act, can only apply to easements and other incorporeal hereditaments; so that from either point of view the tunnel is liable to be assessed.

Lawson Walton Q.C. in reply.

The House took time for consideration.

July 27. LORD HERSCHELL L.C.:—

My Lords, the only question which arises in this appeal is whether the appellants are liable to land tax in respect of a tunnel constructed by them which forms a part of the works of their railway system. The tunnel was constructed under the

(1) 4 E. & B. 549.

(2) 44 Ch. D. 12.

Metropolitan and District Railways (City Lines and Extensions) Act 1879 (42 & 43 Vict. c. cci.), which authorized the construction of certain lines of railway. By the 16th section of that Act it was provided that "with respect to any lands which the two companies are by the provisions of the Act authorized to enter on, take, and use for the purposes of the railways, new street, and works, and which are in or under the roadway or footway of any street, road, or highway, the two companies shall not be required wholly to take those lands or any part of the surface thereof, or any cellar, vault, or other construction therein or thereunder, held or connected with any house in any such street, road, or highway, but the two companies may appropriate and use the subsoil and undersurface of any such roadway or footway, and if need be they may purchase, take, and use, and the owners of and other persons interested in any such vault, cellar, or arches shall sell the same for the purposes of the railways, new street, and works, or any of them; and the purchase of any such cellar, vault, or construction shall not in any case be deemed the purchase of a part of a house or other building or manufactory within sect. 92 of the Lands Clauses Consolidation Act 1845."

Under the powers thus conferred the company constructed under a roadway the tunnel in question, not being compelled, as will be seen by a consideration of the terms of the Act, to purchase the land in the ordinary way. They were empowered to purchase and take any vaults, cellars, or arches which it might be necessary to interfere with in passing under the roadway for the purpose of constructing the railway. It is not necessary to trouble your Lordships with a description of the tunnel. It was of the kind ordinarily found in such works, of very considerable thickness, and of dimensions sufficient for ordinary railway purposes. The question is whether that tunnel, which I do not think it can be doubted is the property of the railway company, is taxable under the provisions of the Land Tax Act (38 Geo. 3, c. 5).

My Lords, the 4th section of that Act provides "that all and every manors, messuages, lands, and tenements and also all quarries, mines of coal, tin and lead, copper, mundic, iron and other mines, iron mills, furnaces, and other iron works, salt springs and salt works, all alum mines and works . . . . and all fishings, tithes, tolls, annuities, and all other yearly profits and all hereditaments of what nature or kind soever they be, situate, lying and being, happening or arising within the several and respective counties, cities, boroughs, towns, or places aforesaid respectively or within any parts of the same, ... shall be charged with as much equality and indifference as is possible by a pound rate for or towards the said several and respective sums by this Act set or imposed."

It is obvious upon reading the terms of the section to which I have just called your Lordships' attention that for some reason or other there is very considerable repetition, that some of the expressions, wide expressions, which are used are sufficient to cover some of the narrower and more limited descriptions of property referred to in the later part of the section. Why some such subjects were specifically mentioned and others left unmentioned it is needless to conjecture; but it is quite certain when one reads the whole of these words that there is no principle which would justify cutting down the general words used, and warrant the conclusion that property which comes within the description of the more general words is to be exempt from taxation because it is not specifically mentioned. The words which are used are undoubtedly very extensive in their operation if they have their natural and ordinary meaning given to them—"all lands and tenements"; "all hereditaments, of what nature or kind soever they be, situate, lying, and being" "within the several and respective counties."

My Lords, the main contention, indeed, I think I may say the only contention which was really pressed upon your Lordships, was this, that having regard to the provisions of the railway Act to which I have called your Lordships' attention, the appellants in reality had only an easement—that no tenement or hereditament was vested in them, and that their rights being confined to an easement, or what is in the nature of an easement, the terms of the Taxing Act in no way apply to them. In support of this view the appellants relied upon the case of *Chelsea Waterworks Company* v. *Bowley* (1), which came before the Court

(1) 17 Q. B. 358.

of Queen's Bench some years ago. In that case it was decided, upon the terms of the particular statute relating to the waterworks then in question, that the water company, in respect of their right to lay pipes for the purpose of carrying a stream of water through certain lands, had no interest in the lands but had only an easement over them. It is quite unnecessary to inquire whether upon the true construction of the Waterworks Act in relation to the facts of that case a correct conclusion was arrived at in determining that the water company possessed an easement only. It is certainly a little difficult to reconcile some of the expressions used in that case with those used in *Reg.* v. *East London Waterworks Company* (1). I do not propose to enter upon any further discussion of those cases, because the ratio decidendi in the case of *Chelsea Waterworks Company* v. *Bowley* (2) was distinctly this, whether the decision was right or wrong, that the water company had no greater rights than those which are possessed by a person entitled to an easement, and that they had no interest in the land. If in the present case the right of the railway company was to an easement only, I should be quite ready to follow the decision in *Chelsea Waterworks Company* v. *Bowley* (2), and to hold that that easement could not be made subject to the payment of land tax. But after carefully considering the matter I have come very clearly to the conclusion that the railway company have not merely an easement, but that they are the owners of an hereditament, and that whether a hereditament which is held by any person be upon the surface or below the surface, that hereditament is, by the terms of the statute, made subject to the payment of land tax.

My Lords, that the statute does contemplate tenements and hereditaments below the surface being subject to land tax is perfectly clear from a perusal of the section, because mines, which are ordinarily, as distinguished from quarries, below the surface, are undoubtedly expressly named and made subject to land tax; and therefore when the words "all hereditaments of what nature or kind soever" are found following a specific description of hereditaments, some on the surface and others

(1) 18 Q. B. 705.

(2) 17 Q. B. 358.

below it, there cannot be the slightest reason for confining the general expression "all hereditaments" to hereditaments on the surface any more than to hereditaments below the surface.

The question, What is the nature of the right possessed by the railway company with regard to this tunnel? depends for its answer upon the construction of the 16th section of the railway companies' Act. The main object of the 16th section was to prevent the railway company from being put to the expense of purchasing land the owner of which it might probably be very difficult to ascertain, and which was of no practical value to any one, namely, the land which lay below certain streets in this metropolis. Even if they touched the cellars of houses bordering on the streets, they were not to be bound to purchase the whole of the tenements with which those cellars were connected, but might take the portion of the land built upon which they required for the purposes of their tunnel upon making compensation and becoming purchasers of so much land as they required.

Now, my Lords, the language used is this, that "the two companies may appropriate and use the subsoil and undersurface of any such roadway or footway." The word "appropriate" is one which seems to me clearly to point to a right of property becoming vested in the companies; they were to "appropriate and use"; and it seems to me that when they have thus made their appropriation and constructed the tunnel, that tunnel is as much their property as if it had been constructed upon land which they had purchased and paid for, and being their property held by them to the exclusion of any other person, it is as much a hereditament as if it had been constructed on land which they had purchased in the ordinary way. Suppose that a part of the tunnel were to pass through what had been a vault or cellar, the portion of the land forming that part of the tunnel would have been purchased in the ordinary way; and this result would follow if the contention of the appellants were adopted, that as regards that part of the tunnel there would be property, and as regards the rest of the tunnel there would be an easement only. I do not think that would be a reasonable construction of the section. It seems to me that its terms, and what was intended to be done, and was done under it, negative the idea that the intention was to give the railway company only an easement.

My Lords, the appellants naturally placed great reliance upon the language of the 17th section, which follows the one upon which I have just been commenting: "Nothing contained in the section of this Act with respect to underpinning or otherwise strengthening houses near the railways, or in the section of this Act authorizing the two companies to acquire easements only under roads, &c., and purchase cellars, &c., nor any dealing with the lands in pursuance of those sections, or either of them, shall relieve the two companies from the liability to compensation under the 68th section of the Lands Clauses Consolidation Act 1845." No doubt the rights which the companies were entitled to acquire are there spoken of as "easements." I think that the use of that word in the section is altogether inaccurate; but the section really was not intended to define the companies' rights; it was intended to provide that notwithstanding the rights which they were to acquire under previous provisions of the Act they were to be liable to pay compensation under the 68th section of the Lands Clauses Act. Of course, for the purpose of that section it was quite sufficient to use any language which would indicate the earlier provisions of the Act to which reference was being made; but it seems to me impossible, having in view the object of the 17th section, to come to the conclusion that because the word "easement" is there used, the effect of the 16th section is to give an easement only.

For these reasons, my Lords, it appears to me to be clear that the ground relied upon on the part of the appellants fails, that the railway company were entitled to something more than an easement, that this tunnel was a hereditament within the words of the Land Tax Act, and that therefore this appeal ought to be dismissed, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, in order to sustain the assessment for land tax, of which the appellant company complain, the respondents must, in my opinion, shew, in the first place, that the interest of the company in that part of their railway, which passes below the highway known as the Crescent, Minories, is an interest in the land, and not a bare easement; and, in the second place, that such interest comes within one or other of the classes of property enumerated in sect. 4 of 38 Geo. 3, c. 5. If these propositions are established, it appears to me that the decision of the Court of Appeal must be affirmed.

The nature of the company's interest depends upon the provisions of the Acts authorizing their undertaking. By these they are empowered, for the purpose of constructing the tunnel which carries their line beneath surface land which is not a highway, to enter upon, and subject to the provisions of the Lands Clauses Consolidation Act, to take and use so much of the lands delineated on the deposited plans as they may require. It does not admit of doubt that they have a real interest in land so taken and used. But a different enactment is made with respect to land, required for the same purpose, which is under the roadway or footway of any street, road, or highway. In that case it is not necessary for the company to acquire the subsoil by agreement or compulsory purchase, except in so far as it is occupied by a cellar, vault or other construction; and where such constructions are connected with a house, or other building, it is declared that their purchase shall not be deemed to be the purchase of part of a house or building within sect. 92 of the Lands Clauses Act. Where no such underground constructions exist, they are authorized, without purchase or compensation, to "appropriate and use the subsoil and under-surface of any such roadway or footway."

There was apparently no cellar or other building which the company required to purchase under the highway of the Crescent, Minories; and they accordingly appropriated and used a considerable portion of the subsoil for the construction of a substantial brick tunnel, which they now occupy as part of their railway. The tunnel has become pars soli in the strictest sense of the words. If it had been constructed by one who was proprietor a centro usque ad cœlum, it would have passed, in the absence of exception, with his conveyance of the land. As matters stand the owners of the soil, whoever these may be, are practically divested of interest in that part of it which has been converted into tunnel. They have no right to occupy or to interfere with it in any way whatever; and their exclusion is not for a period limited, but for all time coming.

To appropriate, according to its natural meaning, is to take and keep a thing by exclusive right; and, as I construe their Act, the authority which it confers upon the company is, to take and exclusively possess as much of the subsoil below highways as may be required for the purposes of the undertaking. There is no substantial distinction between the interest which they get by appropriation, and that which they acquire by purchasing in terms of the Lands Clauses Act. It may be that if their railway undertaking was wholly abandoned their statutory title to the subsoil of highways would cease, and the land which they possess by virtue of it would revert to the original owner. But their Act gives them an interest in perpetuity, if they choose to avail themselves of it; and, at all events, until abandonment actually takes place, the quality of their purchased and of their appropriated rights will, for all practical purposes, be identical.

I think it right to notice that, in one of the clauses of their special Act of 1879, the interest of the company in strata underlying a highway is referred to as an easement, which is a mere burden upon the proprietary right of the owner in fee. It may consist, either in restraining, for the benefit of the dominant tenement, certain uses which its owner might otherwise make of the servient land, or, in compelling him to submit to uses of that land by others, which are not incompatible with his retaining the right of property. In this case, so long as the tunnel is used for railway purposes, the interest of the owner from whom it was appropriated appears to me to be entirely ousted. And I am of opinion that, in the present question, regard must be had to the substance and true legal character of the interest conferred upon the company by statute, and not to general terms occurring in the statute which inaccurately describe it. If the company's interest had, in law, constituted a mere easement, I do not think the respondents could have derived any advantage from its being described as an interest in land.

Is then the interest of the company, being an interest in land, within any of the classes of heritable right, corporeal or incorporeal, which are made liable to the incidence of the land tax by the Act of 38 Geo. 3? The answer to be given to that question does not appear to me to be attended with doubt. I think the tunnel is as much "land" as the highway itself, or any other part of the soil beneath it. I also think that it is a "tenement" within the meaning of the Act. And, if I were wrong in both these conclusions, I should still be of opinion that it fell within the category of "all hereditaments of what nature or kind soever they be."

It was argued that the Act of 1797 applies only to the surface of land and to buildings erected upon it, and that, whenever the surface is taxed, or is exempted, as in this case, by reason of the use to which it is put, no tax is exigible in respect of buildings below the surface. I can find no solid foundation for that argument, either in principle or in the language of the Act. A construction in or below the land is as much a part of it as an erection on its surface. A cellar below a public footway is as much a tenement as the dwelling-house to which it is appurtenant; and I can see no reason for holding that, should they be severed in title, the one would not be as much a hereditament as the other. If the tax were redeemed by the owner of the land, at a time when there were no buildings upon it, I think that buildings subsequently constructed, whether above or below the surface, would be enfranchised.

For these reasons, I concur in the judgment which has been moved by the Lord Chancellor.

LORD ASHBOURNE:—

My Lords, I also concur.

The statute 38 Geo. 3, c. 5 made the land tax perpetual, and the amounts payable by each locality charged are clearly fixed. The object throughout is that the properties liable shall be charged with "as much equality as is possible by a pound rate." It is manifest that if any property is given an immunity, it will be a hardship on all other properties liable to the tax, and it would require clear words to give such an immunity. This is not denied, but it is asserted that this tunnel is not property in land—is not an interest in land—and is merely an easement.

I concur with Cave J. and the three judges of the Court of Appeal that the railway company took more than an easement; they took an interest in land—taking a practically perpetual right of exclusive possession in the tunnel. The case of *Reilly* v. *Booth* (1) supports this view—the words of Lopes L.J. there are in point: "The exclusive or unrestricted use of a piece of land,' "beyond all question passes the property or ownership in that land, and there is no easement known to law which gives exclusive and unrestricted use of a piece of land."

Arriving at the conclusion that this tunnel is an interest in land and within the Act of 38 Geo. 3, I can see no kind of reason why it should not be charged with the land tax, particularly as its exclusion would increase the charge on other payers of the tax.

I only desire to add that as at present advised I do not think that all the reasons given in the case of *Reg.* v. *East London Waterworks Co.* (2) can be easily reconciled with all the reasons given in the case of the *Chelsea Waterworks Co.* v. *Bowley* (3).

LORD MORRIS:—

My Lords, I concur.

LORD SHAND:—

My Lords, I also concur.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 27th July 1893.

Solicitor for appellants: *R. W. Perks.*
Solicitor for respondents: *H. R. T. Alexander.*

(1) 44 Ch. D. 26.
(2) 18 Q. B. 705.
(3) 17 Q. B. 358.

[HOUSE OF LORDS.]

H. L. (E.)
1893
July 28

THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY . . . . . APPELLANTS;

AND

THE SOUTH EASTERN RAILWAY COMPANY . . . . RESPONDENTS.

Interest—Money payable at Time depending on a Future Contingent Event—Time depending on Verification of Accounts—Damages for detention of Debt—3 & 4 Wm. 4, c. 42, s. 28.

An award made upon a joint traffic agreement between two railway companies determined that accounts should be rendered by each company to the other in May; that a payment of not less than 75 per cent. should be made on account of the balance appearing to be due on the face of the accounts so exchanged, and that this payment should be made as soon after the 1st of June as possible and not later than the 15th of June. A large balance became due from one of the companies to the other, to recover which an action was brought and interest claimed:—

Held, affirming the decision of the Court of Appeal ([1892] 1 Ch. 120), that no interest could be recovered under 3 & 4 Wm. 4, c. 42, s. 28; since there was no "debt or sum certain payable by virtue of a written instrument at a certain time," within the meaning of that statute: nor had any demand of payment claiming interest been made in writing: and that interest could not be given by way of damages for detention of the debt, the law upon that subject, unsatisfactory as it is, having been too long settled to be now departed from.

APPEAL from an order of the Court of Appeal ([1892] 1 Ch. 120). Disputes having arisen upon a joint traffic agreement made in 1865 between the appellant and respondent companies they were referred to Mr. Smithells. The only question with which this report is concerned arose upon that part of his award made on the 22nd of September 1868 by which he determined as follows:—

"That for the future rendering, examining, and settling of the joint traffic agreement accounts between the two companies, they shall be made up monthly, and completed within a reasonable period, and as early as possible. For example: 1st. The ordinary accounts for the month of February shall be rendered by each company to the other not later than the middle of the third month (May).

"2nd. The joint agreement account, compiled from the ordinary account, shall be exchanged between the companies by the end of the same month (May).

"3rd. A payment of not less than 75 per cent. shall be made on account of the balance appearing to be due on the face of the accounts so exchanged, and this payment shall be made as soon after the 1st of June as possible, and not later than the 15th of June. . . ."

Disputes having arisen as to the accounts under the award the appellants brought an action in 1884 against the respondents, claiming an account. The official referee who took the account found a large sum due from the defendants to the plaintiffs, of which about £36,000 was for interest which he allowed under 3 & 4 Wm. 4, c. 42. Kekewich J. allowed the interest: the Court of Appeal (Lindley, Bowen and Kay L.JJ.) disallowed it (1). The plaintiffs appealed upon this point and upon another question not relevant to this report.

By 3 & 4 Wm. 4, c. 42, s. 28, it is enacted "That upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums certain be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

July 11, 13, 14, 21, 24, 27. Sir *Horace Davey* Q.C. and *Haldane* Q.C. (*Levett* Q.C. and *Warrington* with them) for the appellants:—

The Court of Appeal felt bound to follow *Merchant Shipping Company* v. *Armitage* (2) in which interest was refused on money payable under a charterparty on the ground that the principal sum was not payable at a time certain, notwithstanding the later case of *Duncombe* v. *Brighton Club and Norfolk Hotel Company* (1), in which it was held that the day for payment need not be mentioned in the instrument, if an event were fixed the date of which could be ascertained afterwards. The claim for interest must be made out under Lord Tenterden's Act (3 & 4 Wm. 4, c. 42). The sum in this case is certain and payable at a certain time—that is at a date which might be ascertained. In the former case the question of interest was not fully argued. In the latter, Mellor and Lush JJ. held interest to be payable, but Blackburn J. differed. It is a narrow construction to hold that a "certain time" must mean a named day. The maxim Certum est quod certum reddi potest applies here. The question of interest was not mentioned in the headnote of the report of *Merchant Shipping Company* v. *Armitage* (2), and it did not find its way into the Digest. Until the mutual rights of the companies were ascertained no exchange of accounts was possible and without such exchange no interest could be claimed. In *Mackintosh* v. *Great Western Railway* (3) before Stuart V.C., it was held that interest might be claimed on a sum payable at a certain date when the amount had to be ascertained by the Court. The respondents ought not to be allowed to be in a better position in consequence of their own default. In *Arnott* v. *Redfern* (1826) (4) it was decided before Lord Tenterden's Act, that a jury might allow interest in the shape of damages when a creditor had been wrongfully kept out of money due under a contract; and in *Hilhouse* v. *Davis* (5) interest was given on a sum awarded by way of compensation for damage done to property, the interest being in the nature of damages for detention of the money.

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(1) [1892] 1 Ch. 120.

(2) Law Rep. 9 Q. B. at p. 114.

The claim for interest may be sustained on four grounds: First that *Armitage's Case* (2) was wrongly decided; secondly, that demand has been made under the statute 3 & 4 Wm. 4, c. 42. To comply with that Act all that is required is that there should be a debt in existence, which there certainly is. The Act draws a distinction between "debts or sums certain." Thirdly, on the authority of *Mackintosh's Case* (1); and fourthly, that interest may be claimed at common law on sums improperly detained, as decided in *Arnott* v. *Redfern* (2).

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(1) Law Rep. 10 Q. B. 371.

(2) Law Rep. 9 Q. B. at p. 114.

(3) 4 Giff. 683.

(4) 3 Bing. 353.

(5) 1 M. & S. 169.

William Willis Q.C., and *C. T. Mitchell*, for the respondents:—

The moneys paid under this arrangement are not in satisfaction of debt. This is not a sum certain; it is contingent on several events. If *Merchant Shipping Company* v. *Armitage* (3) is good law it governs this case, and the accounts must be rendered before any money is payable. If the accounts are not exchanged, the day for payment never comes; no demand can be made; the conditions on which alone any sum is to become due have not been fulfilled. The object of Lord Tenterden's Act was to put all debts of a fixed amount, and due on a fixed day, on the footing of a bill of exchange. In order to make the Act apply there must be an instrument disclosing the amount to be paid. Here there is no contract at all; the parties never got beyond negotiation. As compared with *Merchant Shipping Company* v. *Armitage* (3) this is an à fortiori case, because in that case there was a fixed sum, £5000, due at an ascertainable date, two months after the ship's arrival. The statute requires the demand of the correct sum. Best C.J. was wrong in his statement of the law as it then was in *Arnott* v. *Redfern* (2) because he held that the demand in the writ for interest was sufficient, whereas it is settled that there must be a separate demand. In *Page* v. *Newman* (4) Lord Tenterden C.J. said: "It is a rule sanctioned by the practice of more than half a century that money lent does not carry interest." There was there a sum secured by a written instrument to pay money within a month after A.'s arrival in England. *Higgins* v. *Sargent* (5) was cited, in which it was held that life policy moneys did not bear interest. *Arnott* v. *Redfern* (2) was considered in *Page* v. *Newman* (4) and disapproved. In *Hilhouse* v. *Davis* (6) Lord Ellenborough C.J. expressly abstained from laying down a general rule and simply declined to disturb the damages given by the jury. In *Foster* v. *Weston* (1) no interest was allowed on money secured by an instrument under seal. In Selwyn's Nisi Prius, edition of 1827, under "Action of Debt," *Arnott* v. *Redfern* (2) is not referred to, and it was laid down that the damages given in an action of debt were merely nominal. Lord Tenterden's Act fixes the time by the notice required in sect. 28. The necessity for a demand in writing of a sum certain was insisted on in *Hill* v. *South Staffordshire Railway Company* (3). The appellants did not verify their claim and there has been no conduct on the respondents' part to prevent their doing so. There was no such refusal on the respondents' part to carry out the agreement as would bring the case within *Frost* v. *Knight* (4), where there was a promise of marriage on a given event and the defendant refused before the happening of the event to carry out his promise and was held liable to damages. The law under this head is explained by Cotton L.J. in *Johnstone* v. *Milling* (5).

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(1) 4 Giff. 683.
(2) 3 Bing. 353.
(3) Law Rep. 9 Q. B. at p. 114.
(4) 9 B. & C. 378.
(5) 2 B. & C. 348.
(6) 1 M. & S. 169.

[Lord Watson referred to *Mackay* v. *Dick* (6).]

[They also cited *Taylor* v. *Holt* (7); *Ward* v. *Eyre* (8); *Cook* v. *Fowler* (9); Selwyn's Nisi Prius, edition 1842.]

Sir *H. Davey* Q.C. in reply:—

In *Eddowes* v. *Hopkins* (10) Lord Mansfield C.J. said that interest was payable by the usage of trade, by special agreement or in cases of long delay. In *Craven* v. *Tickell* (11) Lord Thurlow said it was the constant practice at Guildhall to give interest either by the contract or in damages upon every debt detained. In *Marsh* v. *Jones* (12) which was a case of vendor and purchaser, Cotton L.J. at p. 566 said it was not a case of interest but of damages. *Cameron* v. *Smith* (13) and *Hudson* v. *Fawcett* (14) contain dicta to a like effect.

(1) 6 Bing. 709.
(2) 3 Bing. 353.
(3) Law Rep. 18 Eq. 154.
(4) Law Rep. 7 Ex. 111.
(5) 16 Q. B. D. 460, 469.
(6) 6 App. Cas. 251.
(7) 3 H. & C. 452, 457.
(8) 15 Ch. D. 130.
(9) Law Rep. 7 H. L. 27, 37.
(10) 1 Douglas, 376.
(11) 1 Ves. Jun. 59, 62.
(12) 40 Ch. D. 563.
(13) 2 B. & Ald. 305.
(14) 7 Man. & G. 348.

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LONDON, CHATHAM AND DOVER RAILWAY CO.
v.
SOUTH EASTERN RAILWAY CO.

July 28. LORD HERSCHELL L.C.:—

My Lords, the official referee allowed interest on the sums he found to be due by virtue of what is known as Lord Tenterden's Act. Kekewich J. was of opinion that he was justified in so doing. The Court of Appeal took a different view. The provisions of that Act (3 & 4 Wm. 4, c. 42, s. 28) are as follows: "That upon all debts, or sums certain, payable at a certain time"—I leave out for the moment the words "or otherwise" because they relate to a different part of the section to which I shall have to refer presently—"the jury on the trial of any issue or on any inquisition of damages, may if they shall think fit allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time." In order, therefore, to justify the allowance of interest, it must be shewn that there is a debt or sum certain payable at a certain time by virtue of some written instrument. Unless that can be established the case does not come within the words of that part of the section.

In the present case it is contended on behalf of the respondents that there was no debt or sum payable at a certain time under a written instrument. The case on behalf of the appellants rests upon the provisions of Mr. Smithells' award, by which a payment of not less than 75 per cent. was to be made "on account of the balance appearing to be due on the face of the accounts so to be exchanged, and this payment shall be made as soon after the 1st of June as possible, and not later than the 15th of June." It is said that 75 per cent. of the balance, than which the payment was not to be less, was an ascertainable amount by looking at the account, and that therefore it was a "sum certain"; that "as soon after the 1st of June as possible, and not later than the 15th of June," indicated at latest the 15th of June, and that was a "time certain," and therefore you had a sum certain payable at a time certain, namely, the 15th of June, and by virtue of a written instrument, namely, Mr. Smithells' award.

The question which arises has not been without judicial consideration in previous cases. In *Merchant Shipping Company* v. *Armitage* (1), the Exchequer Chamber came to the conclusion that where a sum of money was payable under a charterparty after the right delivery of the cargo, in cash two months after the date of the ship's report inwards at the custom house, although the time was ascertained and became settled by the event, the money was not payable at a "time certain" within the meaning of the statute. In the case of *Duncombe* v. *Brighton Club and Norfolk Hotel Company* (2), which was decided more than a year after, but in ignorance of the fact that the Exchequer Chamber had decided in the manner that I have mentioned, Mellor and Lush JJ. came to the conclusion that although you had not the sum or the time actually mentioned in the written instrument, yet if the written instrument contained provisions which on the happening of an event rendered the time or the sum certain, that was sufficient within the meaning of the statute, and interest could be allowed. Blackburn J. differed from the decision at which the majority had arrived. He took the same view of the statute as the Exchequer Chamber had done in the case of Armitage in the previous year.

I do not think it is necessary to express any decided opinion as to which of those views is the correct one. Undoubtedly the decision of the Exchequer Chamber, supported as it is by the concurrence of Blackburn J., arrived at independently and in ignorance of the decision of the Exchequer Chamber, is authority of very great weight; and I should not dissent from such a body of authority without very serious consideration. But, my Lords, in the present case I do not think it necessary to decide between those two differing views, because even if the view of the law taken in *Duncombe's Case* (2) by the majority be more accurate than the view expressed by Blackburn J. in that case, and by the Exchequer Chamber in *Armitage's Case* (1), I do not think that here it can be said that there was a sum certain payable at a time certain by virtue of a written instrument. There are several difficulties in the way of so holding. For example, the time of payment is to be "as soon after the 1st of June as possible, and not later than the

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(1) Law Rep. 9 Q. B. at p. 114.

(2) Law Rep. 10 Q. B. 371.

15th of June." It is a little difficult to say that that is a time certain even as regards the 15th of June; but upon that I do not dwell. The real difficulty is this—although the words of the statute are "debts or sums certain payable," I think that the certain sum payable must be a certain sum which is due absolutely and in all events from the one party to the other, though it may not come, strictly speaking, within the term "debt." But here the payment of this 75 per cent. was really provisional only. No doubt it was contemplated as very unlikely that there would be any rectification or verification of the accounts which would make a difference of more than 25 per cent. Nevertheless, if it had appeared that in reality, owing to errors in the accounts, 75 per cent. exceeded the amount due, that would have had to be adjusted by some kind of repayment or rectification in a subsequent account; and, therefore, this is not really a provision for the payment of a debt or a sum certain absolutely from one party to the other; it is at best a provisional payment which may have to be undone by a subsequent adjustment. My Lords, for these reasons I do not think it can be held in the present case that there is a sum certain payable at a certain time by virtue of a written instrument.

Then the statute provides for another case in which interest may be allowed, namely, if a demand has been made in writing for the amount with notice that interest will be claimed. In the present case that has not been complied with. It has been said that there was not an opportunity of complying with it because for a time the respondents refused to exchange accounts and to proceed under the agreement at all. In certain cases that might in equity entitle the party who was in the right in the contest to treat the matter as if he had given such notice; if, for example, he had written, "It is impossible to ascertain the exact amount because you will not give me a proper account; but I give you notice that I claim whatever is the amount, with interest from this date." I think if he had taken such a step as that, although it would not have been at law a compliance with the terms of the statute, in equity he would have been regarded and ought to have been regarded as being in the same position as if he had complied with the statute.

But in the present case there was no attempt, as far as I can see, to do anything of the kind. There was nothing like a notice given that a certain sum was due and that interest would be claimed, and that the only reason why the amount was not stated was that there had been a failure to deliver the necessary accounts. Therefore at law the case is clearly not within the second part of sect. 28 of Lord Tenterden's Act, nor do I think that in equity a sufficient case has been established to entitle the appellants to interest.

But, my Lords, the appellants contended that even although they might not under the terms of Lord Tenterden's Act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of their debt. I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action; and for this reason, that I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events. But I have come to the conclusion, upon a consideration of the authorities, agreeing with the Court below, that it is not possible to do so, although no doubt in early times the view was expressed that interest might be given under such circumstances by way of damages.

The first case to which we were referred was *Eddowes* v. *Hopkins* (1), where Lord Mansfield held, "that though by the common law book debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade or of a special agreement" (which of course is beyond question), "or

(1) 1 Douglas, 376.

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Lord Herschell, L.C.

in cases of long delay under vexatious and oppressive circumstances if a jury in their discretion shall think fit to allow it." That is somewhat vague; the jury would have to consider whether there had been a long delay and whether the circumstances were vexatious and oppressive, and some difficulty might be felt in determining either what was sufficiently long to satisfy the rule or what was vexatious and oppressive.

In a subsequent case, *De Havilland* v. *Bowerbank* (1), Lord Ellenborough laid down a somewhat different rule; he said that interest ought only to be allowed, (1.) where there is a contract for payment on a day certain, as on bills of exchange; (2.) where there is an express promise; (3.) where it may be inferred from the course of dealing; and (4.) where the money has been actually used and interest made of it. This is much more limited than the doctrine laid down by Lord Mansfield, and there seems a good deal in the point made by the then Attorney-General with reference to the last ground, that the damages would be estimated by what the defendant had gained, not by what the plaintiff had lost. I cannot say that the rules laid down by Lord Ellenborough are very satisfactory.

In the case of *Arnott* v. *Redfern* (2) the question came before the Court of Common Pleas, presided over by Best C.J., the other judges being Park, Burrough, and Gaselee, JJ. That was a case in which a judgment had been obtained in a Scotch Court, and interest had been given, practically speaking, I think from the time when the debt had become due. The question was whether in a declaration on this judgment in this country the part of the claim relating to interest should be allowed. Best C.J., in giving the judgment of the Court, considered whether interest could have been given under such circumstances according to the law of England. He quoted the case of *Eddowes* v. *Hopkins* (3), and he also quoted the passage cited by the learned counsel yesterday in argument, where the Lord Chancellor said, in the case of *Craven* v. *Tickell* (4): "From conversations which I have had with the judges, interest is given either by the contract or in damages upon every debt detained." And in his judgment Best C.J. says: "If it had appeared by evidence that the plaintiff had taken no steps for so many years to recover his debt, interest could not have been recovered for it in this country; and the question would have arisen whether we could have carried into execution the judgment of the Scotch Court which gave interest in a case where our law did not allow it." "But we have no right to conclude that the plaintiff quietly permitted the debt due to him to remain in the hands of the defendant. In many cases it is presumed that when nothing is proved to have been done nothing has been done"; but that he says was not the case before him. Then he says: "However a debt is contracted, if it has been wrongfully withheld by the defendant after the plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the money." Now, that is a very clear expression of principle and a rule sufficiently definite. The only difficulty which might arise is in construing what is meant by "endeavouring to obtain payment of it." If it were confined to endeavouring to obtain payment by process of law, there would not be the slightest difficulty, and the rule might well have been worked out. But I think from the expressions used that probably the Chief Justice did mean to refer, not merely to endeavouring to obtain it by litigation, but endeavouring to obtain it by demand or otherwise. If that general proposition had been regarded as law, I think that it might have justified in the present case allowing interest to some extent to the appellants.

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(1) 1 Camp. 50.

(2) 3 Bing. 353.

(3) 1 Douglas, 376.

(4) 1 Ves. Jun. 60.

But in the case of *Page* v. *Newman* (1) the matter was considered by the Court of King's Bench, presided over by Lord Tenterden, the other judges sitting with him being certainly judges of high authority, namely, Bayley, Littledale, and Parke JJ. He there referred to the language of Best C.J., which I have just read, and he said: "If we were to adopt as a general rule that which some of the expressions attributed to the Lord Chief Justice of the Common Pleas in *Arnott* v. *Redfern* (2) would seem to warrant, viz., that interest is due wherever the debt has been wrongfully withheld after the plaintiff has endeavoured to obtain payment of it, it might frequently be made a question at nisi prius whether proper means had been used to obtain payment of the debt and such as the party ought to have used. That would be productive of great inconvenience. I think that we ought not to depart from the long-established rule that interest is not due on money secured by a written instrument unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments."

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(1) 9 B. & C. 378.

(2) 3 Bing. 353.

Now, my Lords, I cannot profess to be altogether satisfied with the reason which Lord Tenterden gives, although of course for so eminent a judge one entertains the greatest respect. To say that it might be made a question at nisi prius whether proper means had been used, and that it might be productive of great inconvenience, does not seem to me a satisfactory reason for excluding altogether any claim to interest by way of damages in cases where justice requires that it should be awarded. There might be inconvenience; but it seems to me that such inconvenience might reasonably be submitted to, and ought to be submitted to, if it is necessary for the purpose of applying a sound principle in a just manner. There are a great many things at nisi prius which are decidedly inconvenient; no doubt one would desire always to avoid inconvenience in determining questions between litigants; but it cannot be avoided, and therefore I do not profess to be altogether satisfied with the reason which Lord Tenterden gives. Nevertheless, so far as I am aware, from that time down to the present the rule which Lord Tenterden lays down has been followed, and no attempt has been made (or at all events has received the sanction of the Courts) to revert to the earlier and, as I think, more liberal views of those who preceded him. And one cannot shut one's eyes to the fact that Lord Tenterden, who presided and delivered that judgment, was the author of the statute to which I have been directing the attention of your Lordships under which interest can now be allowed; and when he dealt with the allowance of interest in this statute he certainly introduced language which kept such claims within very narrow limits; speaking for myself, they seem to be too narrow for the purposes of justice. Nevertheless, having regard to the view of the law laid down by the Court of King's Bench in the case which I have just mentioned, and to the statute passed subsequently with obvious reference to it by the Legislature, and the absence since that time of any case in which the doctrine of Lord Mansfield or of Best C.J. has received practical effect in any decision in any of the courts, I do not think it would be possible nowadays to reopen the question, even in this House, and to hold that interest under such circumstances could be awarded.

My Lords, for these reasons I have come to the conclusion that the Court below were right upon the question of interest, and that their judgment in that respect must be affirmed. Inasmuch as I move your Lordships to reverse that judgment so far as it relates to the £30,000 item and to affirm it so far as it relates to interest, I would advise your Lordships that no costs should be given either in this House or in the Court of Appeal, but that here and in the Court of Appeal each party should bear their own costs.

LORD WATSON:—

My Lords, upon both questions raised in this appeal I have had little difficulty in coming to the same conclusion with the Lord Chancellor. My noble and learned friend has dealt with the case, in all its aspects, so fully and satisfactorily, that I shall content myself with briefly indicating the leading considerations which have influenced my opinion.

Upon the second question I see no reason to doubt that the decision of the Court of Appeal is right. Whatever might be said in regard to the older authorities upon the matter of interest, I am of opinion that the law laid down by Lord Tenterden in *Page* v. *Newman* (1), to the effect that "interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments," is not now open to question. The Act 3 & 4 Will. 4, c. 42, is evidently framed upon the assumption that the law was correctly stated by Lord

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(1) 9 B. & C. at p. 381.

Tenterden in that case; and in dubio such a statutory recognition is not unimportant. Besides, Lord Tenterden's rule, except in cases when it has been relaxed by the statute, appears to have been followed in the decisions since its date.

The appellants cannot in my opinion bring their claim for interest within the first branch; and whilst I approve of the equitable rule to which Stuart V.C. gave effect in *Mackintosh* v. *Great Western Railway Company* (1), I do not think it can be strained so far as to give them the benefit of the second branch of the statute. I regret that I am unable to differ from your Lordships upon the question whether interest could be given in this case by way of damages; I think it clearly cannot, for the reasons which have been sufficiently expressed by the Lord Chancellor and by the learned judges of the Appeal Court. To my mind the state of the law as settled by statute and decisions is not altogether satisfactory.

Lord Morris:—

My Lords, I concur in the judgment which has been moved; and I desire to add that on the construction of 3 & 4 Will. 4, c. 42 I entirely concur in the judgment of the Exchequer Chamber in the case of *Merchant Shipping Company* v. *Armitage* (2).

Lord Shand:—

My Lords, I have very little to add to what has been said by your Lordships, concurring as I do in the opinions which have been delivered by the Lord Chancellor and by my noble and learned friend opposite (Lord Watson).

Upon the question of interest, I find that the figures given by the official referee with regard to the amount involved are certainly very considerable. I see that he reported that in his opinion there ought to be an item of £22,171 and another item of £14,574, making together somewhere about £36,000 or £37,000, paid in the name of interest, and that upon the footing that very large sums of money had been retained in the coffers of the respondent company which ought long ago, or at all events in the course of their accounting from time to time, to have been paid to the appellant company. That being the state of matters, I confess that I have looked with very great anxiety to the possibility under the law of England, as I have heard it argued, of giving interest in this case, for I cannot help thinking that a gross injustice is the result of withholding it. It appears to me that it is a defective state of the law that one party should be entitled to retain a large sum such as this (it might have been a smaller sum, but the principle would be the same—it strikes one more forcibly when you come to deal with such sums as this) by simply creating delay in furnishing the requisite accounts and by refusing payment.

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(1) 4 Giff. 683.

(2) Law Rep. 9 Q. B. at p. 114.

My Lords, I am unable to agree with what has fallen from my noble and learned friend near me (Lord Morris) as to the case of Armitage; I confess that as the result of the reasoning in those cases and the argument which I have heard, the case of Duncombe appeals much more forcibly to my mind than what was said in the Exchequer Chamber, and to a certain extent I think said without any reasons being given; but, having regard to the reason which the Lord Chancellor has given as to the provisional character of these payments, I do not think that interest can be allowed. My Lords, I do not venture to express any confident opinion as to the possibility of interest being given in the way of damages. This is a subject with which I am very unfamiliar; but I concur in thinking that authority seems to be against it.

I shall only add that I regret that the law of this country in regard to the running of interest is not like the law of Scotland, with which I am more familiar. In that country it is the common and ordinary practice, in bringing an action for money which is due, to conclude not only for the payment of that money but for the payment of interest upon it from the date of citation or service of the summons, and interest is decreed as a matter of course on whatever balance is found to be due. I may even say that it is a rule which has received general effect, that where money is shewn to have been due and to have been demanded, interest runs if the demand or request of payment is not acceded to. That is the case, even although too large a sum

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London, Chatham and Dover Railway Co. v. South Eastern Railway Co.

may have been demanded. If it be found that a sum short of what was demanded is due, still the law gives interest unless the amount really due has been tendered. It is not necessary that an intimation must be made that interest will be demanded in order that interest shall run, and I cannot help thinking that it is desirable that no such strict law as that expressed in Lord Tenterden's statute should continue to be the rule in this country.

Order appealed from reversed on a point not relevant to this report; in other respects affirmed; the appellants and respondents respectively to bear their own costs in this House and in the Court of Appeal; Cause remitted to the Chancery Division.

Lords' Journals 28th July 1893.

Solicitors for appellants: *C. & S. Harrison & Co.*
Solicitor for respondents: *W. R. Stevens.*

[HOUSE OF LORDS.]

H. L. (E.)
1893
July 31.

THE STOCKTON AND MIDDLESBROUGH WATER BOARD . . . . APPELLANTS;

AND

THE KIRKLEATHAM LOCAL BOARD . RESPONDENTS.

Waterworks—Purchase of Mains, Pipes, and Fittings—Principle of Valuation—Price without Compensation for Loss of Profits.

A water board was constituted by a special Act with the right of supplying water within the boundaries of two boroughs and also certain districts beyond those boundaries; provided that when so required by the sanitary authority of any such outlying district the board should sell to such sanitary authority the mains, pipes, and fittings belonging to the board within that district "at a price to be fixed, in default of agreement, by an arbitrator;" and after such sale the board should cease to supply water within such district.

In an arbitration under this provision between the board and an outlying district:—

Held, that upon the true construction of the special Act the word "price" meant price, and not compensation; and that in fixing the price the basis of calculation should be merely the value of the mains, pipes and fittings regarded as plant in situ capable of earning a profit, and that the arbitrator must not include in the price compensation to the board for the loss of the right to supply water within the outlying district.

The decision of the Court of Appeal ([1893] 1 Q. B. 375) affirmed.

THE only question raised by this appeal from a decision of the Court of Appeal turned entirely upon the special terms of a special Act. The terms of the Act and the circumstances are set out at length in the report of the decision below (1), and are for the purposes of this report concisely and sufficiently stated in the judgment of Lord Herschell L.C.

Sir *R. E. Webster* Q.C. and *Balfour Browne* Q.C. (*Scott Fox* and *Claude Baggallay* with them) for the appellants contended that the Act gave the arbitrator an absolute discretion in fixing the price; that there was nothing in the Act to prevent him including in the price a sum for the loss to the appellants of the right to earn a revenue by supplying water to the Kirkleatham district; that the word "price" could fairly include such a sum; and that it was impossible to suppose the Act intended the board to be deprived of the right to earn this revenue without compensation. They referred to the Public Health Act 1875 (38 & 39 Vict. c. 55) ss. 51, 52.

Finlay Q.C. and *J. G. Wood* for the respondents were not heard.

LORD HERSCHELL L.C.:—

My Lords, in this case I am unable, notwithstanding the forcible argument which has been addressed to the House by the learned counsel for the appellants, to entertain any doubt that the judgment of the Court below is right.

The question arises upon the construction of the 4th section of the Stockton and Middlesbrough Corporations Waterworks Act 1876, 39 & 40 Vict. c. ccxxx. Prior to the passing of that Act the Stockton and Middlesbrough Waterworks Company had the right to supply, not only Stockton and Middlesbrough, but a number of other parishes and places, and amongst them Kirkleatham. Under the provisions of this Act the Stockton and Middlesbrough Corporations took over from the Stockton and Middlesbrough Waterworks Company their undertaking, and paid for it a lump sum, and in assessing the amount to be paid there was to be taken into consideration a sum for compulsory sale and for the prospective value of the company's undertaking. At the time when the Act of 1876 was passed the state of things with regard to Kirkleatham was this, that the Stockton and Middlesbrough Waterworks Company having the right to supply the Kirkleatham district, under the Public Health Act of 1875 the Kirkleatham Sanitary Authority were deprived of the power and right to construct waterworks within the limits of supply of the Stockton and Middlesbrough Waterworks Company, provided that the company were willing to give a reasonable supply either at the statutory rate, or if there was no statutory rate at a rate to be fixed by arbitration.

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(1) [1893] 1 Q. B. 375.

The Act of 1876 contains the clause to which I may now direct your Lordships' attention, and upon which, as I have said, the question arises: "The limits of this Act for the supply of water shall comprise and include the company's present limits, and the parishes, townships, and places, or parts of parishes, townships, and places set forth in the first schedule to this Act annexed: provided always that the joint board hereinafter constituted shall, when so required by the sanitary authority of any district beyond the boundaries of the boroughs of Stockton and Middlesbrough respectively, sell to such sanitary authority all mains, pipes, and fittings belonging to the joint board within that district, other than and except any mains, pipes, or fittings used for service beyond the limits of that district, at a price to be fixed, in default of agreement, by an arbitrator to be appointed for that purpose by the Local Government Board on the application of either party, and after such sale the joint board shall cease to supply water within such district."

The Act then constituted the appellant board as a joint water board and transferred to them all the powers and authorities of the company. Now, by virtue of the provision which I have just read, as soon as the sale was completed and the joint board ceased to supply water, the only barrier to the supply of water by the Kirkleatham Sanitary Authority was removed. Their right to supply water after that date arose from the provisions of the Public Health Act, 1875, the enactment in the Act of 1876, to which I have just called attention, having removed the impediment in the way of their acting under the statute of 1875. The Kirkleatham Sanitary Authority gave the requisite notice; an arbitrator was appointed by the Local Government Board, and he stated his award in the form of a special case. He said that "two rival contentions were put before him as to the principle upon which the price of the 'mains, pipes, and fittings' ought to be ascertained." He gives first the contention of the Kirkleatham Local Board, "that the basis of calculation should be merely the value of the mains, pipes, and fittings regarded as plant in situ capable of earning a profit; and this value they arrived at by taking the cost of the mains, pipes, and fittings, of laying them down and making good the ground, and deducting a sum for depreciation." The joint board contended "that the price must be ascertained by reference to the value of that which was parted with, but that that value must be taken as the value to the seller and not the value to the buyer, and that as the sale of the mains, pipes, and fittings in question was coupled with an obligation on the part of the joint board to cease to supply water within the Kirkleatham district, what the joint board were really parting with was their power of earning revenue by the supply of water through the mains, pipes, and fittings in question in the Kirkleatham district, and that at all events the value to them of the mains, pipes, and fittings in question was to be measured, not by the cost of providing them and laying them down, or by their mere value as plant in situ, but by the revenue which the joint board was enabled to earn by their means." The arbitrator then states that he came to the conclusion "that the contention of the joint board was the correct one," and made his award for the sum of £25,424.

The Queen's Bench Division (Pollock B. and Vaughan Williams J.) made an order declaring that the arbitrator was wrong in adopting the basis of calculation he adopted, that he should have adopted the basis contended for by the Kirkleatham Local

Board, and that the award ought to stand for the sum of £8006 only. The Court of Appeal (Lindley, Bowen and A. L. Smith L.JJ.) affirmed this order (1).

Now, my Lords, it appears to me that the contention of the joint board is one which it is impossible to adopt, having in view the language used in the 4th section of the Act. A great many arguments have been urged upon your Lordships to shew that to construe the words of that section according to their natural meaning would not really work out complete justice between the parties. I think that is perfectly possible; but nevertheless that is a consideration which cannot be allowed to influence the judgment of your Lordships, and probably did not influence the judgment of the Court below. It may be that in this stipulation for compensation, or price rather, the parties have not so worded the provision as to enable the Stockton and Middlesbrough Joint Board to be fully satisfied for all their just claims in respect of the change of position which would take place when the Kirkleatham Sanitary Authority bought these mains, pipes, and fittings, and the Stockton and Middlesbrough Joint Board ceased to have the right of supplying Kirkleatham. However that may be, I do not think that it is possible to say that the arbitrator would be fixing the price to be paid for the mains, pipes, and fittings if he were to allow himself to be guided by the contention of the joint board; because in truth what they were claiming was not the price of the mains, pipes, and fittings, but the price of those mains, pipes, and fittings coupled with certain statutory rights. They were seeking to be paid for a revenue-earning right which was made use of by means of the mains, pipes, and fittings, and not merely for the mains, pipes, and fittings themselves. I do not think it is possible to maintain the position, that the sum of money so claimed was within the power of the arbitrator to award under the terms of the 4th section.

Then it was suggested that he had erred as regards the sum which he had awarded, inasmuch as even if the contention of the appellants were not well founded he had not assessed the price upon the right basis. There were only two rival contentions before him: one that which he adopted, in which, as I have indicated to your Lordships, I think he was wrong; the other was, "that the basis of calculation should be merely the value of the mains, pipes, and fittings regarded as plant in situ capable of earning a profit." In the view which I take it appears to me clear that that properly expressed what the arbitrator ought to have taken as the basis of his calculation. He then says: "If the Court should be of opinion that I was wrong in adopting the basis of calculation aforesaid and that the basis contended for by the Kirkleatham Local Board should have been adopted, then I award in the alternative that the price of the mains, pipes, and fittings calculated upon such basis is the price or sum of £8006." Now, my Lords, if that basis be, as I have said, the correct one, he has distinctly found that, adopting that basis, he has arrived at the sum of £8006, and there would seem to be an end of the matter.

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(1) [1893] 1 Q. B. 375.

But, it is said, he adds to the words which I have read to your Lordships this: "and this value"—that is, the value of the mains, pipes, and fittings regarded as plant in situ capable of earning a profit—"they arrived at by taking the cost of the mains, pipes, and fittings, of laying them down and making good the ground, and deducting a sum for depreciation." Now if this decision involved determining that under all circumstances that would be the proper way of finding the value of the mains, pipes, and fittings in situ capable of earning profit, I should certainly require to give the matter much further consideration, because it seems to me that that method would not in all cases properly determine the value even upon the basis contended for by the Kirkleatham Local Board. It appears to me that one could well put cases where that would not be the proper mode of estimating the price upon that basis. A water supply system in a considerable district can only be laid down after expenditure has been going on for a considerable time; capital is being expended from time to time, and those who are putting the water system in situ are out of that capital and obtaining no return from it for a considerable time. They can only obtain that return when the whole system is complete and ready for working. It is obvious that any one who found that whole system complete and ready for working would be prepared to give more for it than the aggregate sums which had been spent in constructing it, inasmuch as he would have it then ready, and as soon as he had paid his money for it he would be in a position almost immediately to begin earning a profit, at all events much more quickly than if he had occupied a great deal of time in its construction. Therefore, whilst I think that the basis suggested by the Kirkleatham Local Board is correct, it may be that in certain circumstances the suggested mode of applying that basis would not be correct.

But, my Lords, into that it seems to me it is impossible to enter. The arbitrator has stated that he adopted the basis contended for by the Kirkleatham Local Board. That basis was a perfectly proper one to adopt; and he has found that, adopting that basis, he estimates the price at £8006. It seems to me that it is impossible for your Lordships to go behind that finding of the arbitrator.

For these reasons, I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed with costs.

LORD WATSON:—

My Lords, this appears to me to be a very plain case. I do not think it would be possible to give effect to the argument of the appellants except by introducing into the 4th section of their special Act of 1876 words which are not to be found there and which are at variance with its text. I therefore concur in the judgment proposed.

LORD MACNAGHTEN:—

My Lords, I entirely concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 31st July 1893.

Solicitor for appellants: *J. G. Lincoln, for J. T. Belk, Middlesbrough.*

Solicitors for respondents: *Durnford & Co.*

[HOUSE OF LORDS.]

H. L. (I.)
1893
Aug. 4.

THE REV. THOMAS KEHOE, THE REV. JOHN MAHER, AND THOMAS MACKEY } APPELLANTS;

AND

THE MARQUESS OF LANSDOWNE . . RESPONDENT.

Agreement for Letting for a Specified Purpose—Provision of Clergyman's Residence—Breach of Agreement—Application of Premises to another Purpose—Erection of Huts for Evicted Tenants.

The owner of land in Ireland agreed with a Roman Catholic bishop to let a few acres to him and his successors, in order to provide a suitable residence and holding for a Roman Catholic officiating clergyman upon the estate, to be held so long as there should be and remain stationed upon the premises such an officiating clergyman, appointed by the bishop and his successors:—

Held, affirming the decision of the Irish Court of Appeal (29 L. R. Ir. 230), that upon the true construction of the agreement which was informally expressed, the erection upon the premises of several wooden huts (not attached to but resting on the freehold) as a shelter for evicted tenants was an application of the premises to a purpose other than the specified one, and therefore a breach of the agreement, and that the owner was entitled to have it restrained by injunction.

APPEAL from an order of the Court of Appeal in Ireland (Lord Ashbourne L.C., FitzGibbon and Barry L.JJ. (1)) affirming an order of the Master of the Rolls in Ireland. The facts are fully stated in the judgments.

June 4, 8. Sir *H. Davey* Q.C., and *Haldane* Q.C. (*John Kemp* with them) for the appellants:—

These huts are in no sense part of the land, on which they merely rest by their own weight, and the rule "solo cedit" does not apply. The judges below have imported into the contract a negative term which is not implied. There are no words binding the tenant not to use any of this property for any other purpose than as a clergyman's residence. It is the function of a parish priest to give shelter to the poor. In *Hodgkinson* v. *Crowe* (2),

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(1) 29 L. R. Ir. 230.

(2) Law Rep. 10 Ch. 622.

James L.J. (p. 624) expressed himself strongly against inferential contracts or the implication of covenants not expressed in a lease. If the permanent character of the property is not altered—as for example by the conversion of pasture into plough land—the tenant can use his holding as he pleases. He may, as is often done in England, take poor children from a town for a holiday. He might even let these huts and receive rent for them, if it was the most profitable way of dealing with the holding. Then it is said that this is a trust. If so, the Attorney-General is the only person who can move. Trusts for Roman Catholic purposes are lawful charitable trusts, which neither ratepayers nor parishioners nor any one else can enforce without the Attorney-General: *Strickland* v. *Weldon* (1). But in truth there is no trace of fiduciary relation or of any other relation than that of landlord and tenant. There is no implied covenant not to assign or to use the place only as a priest's residence. Moreover, if the tenant allows a person, at his own will, to reside on part of the holding, there is no assignment and the occupation is still that of the tenant. In *Iven* v. *Elwes* (2) Kindersley V.C. says (p. 34) that a covenant or agreement ought never to be implied unless the fair and honest construction of the deed or the necessities of the case so require. In *James* v. *Cochrane* (3) Parke B. (p. 177) held that the language used must not only shew that the parties contemplated that the thing might be done, but must "amount to a binding agreement upon them that the thing shall be done," and pronounced against the implication of a covenant. The words "successor or successors" are of course inoperative, and must be omitted as the bishop is not a corporation. These huts are temporary and confer no rights on the occupants.

As to waste, *Doe* d. *Grubb* v. *Earl of Burlington* (4) is in point. There it was decided that if a copyholder pull down a barn without any intention of rebuilding, the lord cannot recover the place from him, on the ground of a forfeiture, if the jury find that the premises are not damaged. In *Doherty* v. *Allman* (5) Lord Cairns L.C. (p. 719) explained the principles and practice of Courts of Equity in restraining persons from committing acts. The injunction was there refused as no damage was done by the lessor to the reversion. It does not follow that because a Court of Equity in decreeing specific performance of an agreement would in settling the form of the contract insert certain clauses, those clauses are to be implied in construing the first informal agreement: *Sackville-West* v. *Holmesdale* (1) per Lord Westbury (p. 565–6). See also *Beale* v. *Sanders* (2). In *Hodgkinson* v. *Crowe* (3) James L.J. quotes the words of Lord Eldon: "The safest rule for property is that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make, and that nothing which flows out of that interest as an incident is to be done away by loose expressions to be construed by facts more loose, and that it is upon the party who has forborne to insert a covenant for his own benefit to shew his title to it."

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(1) 28 Ch. D. 426.

(2) 3 Drew. 25.

(3) 7 Ex. 170.

(4) 5 B. & Ad. 507.

(5) 3 App. Cas. 709.

Finlay Q.C. and *Carson* Q.C. (of the Irish Bar) for the respondent:—

The judgments below turned, and rightly, on the principle that the trust or purpose for which the agreement was made should be the measure of the contract and define the scope of its interpretation. It is different from the case of a grant in fee; and the agreement shews on the face of it an intention to reserve control to the landlord. The agreement would naturally have been perfected by a long lease, at the expiration of which the landlord would have received the land again with a village upon it—for these huts are substantial structures. The condition of the agreement is that the holding should be used for no other purpose than a priest's residence, and purposes reasonably incidental thereto. The establishment of a colony on the land is not a reasonably incidental purpose. It may be difficult to define accurately what are such purposes; but this user of the land is clearly unreasonable. Could, for example, a public-house be erected on the land, and would the erection of a public-house according to the appellants' argument depend upon the question whether or not the public-house simply rested by its own weight, or was built into the ground? Such user of the land is clearly waste, as the agreement is that it shall be to provide a home for the parish priest. The agreement was one which might have been terminated at any moment. In the first instance, it was for Bishop Haly's life: thus a yearly tenancy was created by payment of rent. The land might at any moment have been thrown on the landlord's hands. Is it within the scope of the agreement, or the possible contemplation of the parties, that the landlord should, at the end of the agreement or trust, have a hundred people to deal with and all these huts to dispose of? The grass would be destroyed and the land ruined. Questions of rating and sanitation might arise and difficulties created with the local authorities. There might be no breach of the trust and yet a breach of the purpose. The residue and holding must be taken as one whole, and this use of the land is inconsistent with its proper use as a priest's residence.

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(1) Law Rep. 4 H. L. 543.

(2) 3 Bing. N. C. 850.

(3) Law Rep. 10 Ch. 622, at p. 625.

Sir *Horace Davey* Q.C. in reply:—

No negative covenant can be implied; and if one could rightly be inserted, its form would not exclude this employment of the holding. The contract contains careful stipulations, and there is no warrant for the insertion of covenants not covered by those stipulations. It is not denied that the priest could, if he were disposed, turn farmer and cultivate the land. He could let the land to a neighbouring farmer. The term "residential" is vague; it might no doubt exclude the carrying on of a trade, but it is not easy to see what other force it has. The only limit in the law of landlord and tenant which applies is the law of waste; and there is no waste, and no restraint on the priest's using the land in a manner most beneficial to himself.

The House took time for consideration.

Aug. 4. LORD HERSCHELL L.C.:—

My Lords, this case has presented to my mind some difficulty. I have, however, arrived, after full consideration, at the conclusion that the judgment of the Court below ought not to be disturbed.

On the 1st of May 1839 an agreement was entered into between Mr. J. R. Price, land agent, for and on behalf of the then Lord Lansdowne of the one part, and Dr. Haly, the then Roman Catholic Bishop of Kildare, of the other part, in the following terms: "Whereas the said Marquis of Lansdowne is minded and desirous to provide a suitable residence and holding for the Roman Catholic officiating clergyman at and upon his Lordship's estate and property at Luggacurren, in the Queen's County, and for that purpose to grant and let unto the said Right Reverend Francis Haly in trust for that purpose, and to his successor and successors for the like purpose, All that and those, that part of the lands of Luggacurren, as late in the possession of the Reverend Bartholomew Cummins, containing by estimation 10A. 1R. 6P. late Irish plantation measure, the boundaries whereof are delineated on a map of said lands made by Mr. Clarges Green, land surveyor, which said premises are situate in the barony of Stradbally, in the Queen's County, at the yearly rent of £15 7*s.* to be paid to the said Marquis of Lansdowne and his heirs by the said Right Reverend Francis Haly, his successor and successors, by two even and equal half-yearly payments, that is to say, on every 29th day of September and 25th day of March in every year, the first payment thereof to be made on the 29th day of September next. To hold for and during such time and at all times hereafter as there shall be and remain stationed at and upon the said hereby granted and demised lands and premises, an officiating Roman Catholic clergyman at the chapel of Luggacurren, in the parish of Ballyadams, duly appointed by the said Right Reverend Francis Haly and his successor and his successors from time to time and at all times, for ever hereafter, leases to be perfected containing the usual clauses and covenants as are contained and mentioned in the usual leases of the said Marquis of Lansdowne, and also the usual covenants between landlord and tenant, at and upon the reasonable request of the said Right Reverend Francis Haly and his successor and successors, to the said Marquis of Lansdowne and his heirs. Dated the 1st day of May, in the year of our Lord 1839."

The agreement was signed, sealed, and delivered by the respective parties, but no lease has ever been asked for or executed in pursuance of it. After the execution of the agreement the then curate of the parish of Ballyadams, who acted as officiating clergyman at the chapel of Luggacurren, entered into occupation of the dwelling-house and lands which were the subject of the agreement, and continued to reside there so long as he filled the position of curate of the parish. All the clergymen who have subsequently been the officiating curates at Luggacurren have resided upon the holding. The appellant, the Rev. John Maher, has been in residence there as curate for the last few years.

During the lifetime of Dr. Haly, who died in August 1855, the rent was regularly paid in his name by the parish priest of Ballyadams. Dr. Haly was succeeded by Dr. Walsh, who continued bishop until his death in 1888, when Dr. Lynch became the bishop of the diocese. Neither Dr. Walsh nor the present bishop in any way intervened in relation to the agreement or the payment of the rent. It has, however, been paid from time to time by the parish priest of Ballyadams, and the appellant, the Rev. Thomas Kehoe, who fills that office, has made the payment for many years. The receipts given to him have commenced with the words, "Received from the Reps. Revd. Dr. Haly."

In the month of August 1887 twenty-one cottages or huts were erected on the lands which were the subject of the agreement, and these huts, or at least twenty of them, have been for a long time occupied by tenants who had been evicted from their holdings upon the estate of the respondent at Luggacurren for non-payment of rent, together with the families of such tenants. It is said, and must, I think, be taken to be the case, that although some of the sods were cut away for the purpose of levelling the ground, the huts were not otherwise attached to the freehold than that they rested on it. It was stated in evidence that the erection of the huts occupied about two months.

The present action was brought to restrain the appellants (and other persons who have been dismissed from the suit by the Courts below) from keeping the cottages or huts erected upon the land. By the order under appeal the appellants were restrained from keeping erected upon the lands of Luggacurren the cottages or huts erected thereon, and it was ordered that they remove the same and be restrained from erecting upon the said lands any dwelling-houses or buildings unsuitable to the holding, and from using the lands otherwise than as a residence and holding for the Roman Catholic officiating clergyman at the chapel of Luggacurren, or in any other manner contrary to the provisions of the articles of agreement of the 1st of May 1839.

It is to be observed that by the agreement the premises were to be let to Dr. Haly and his successor and successors. Inasmuch as the Bishop of Kildare was not a corporation sole, it is obvious that the demise contemplated could not legally have effect, and that on the death of Dr. Haly his rights under the agreement did not vest in his successor, and no acts were done by either his immediate or present successor in the See of Kildare which created any relation of tenancy between them and the respondent.

My Lords, I do not think it is necessary to attempt to define the exact legal position which arose from the continued occupation of the land and the receipt of the rent from the parish priest by the respondent and his predecessor in title after the death of Dr. Haly; it is sufficient to say that no right has been acquired by the parish priest who paid the rent, or by any one occupying the land which was the subject of the agreement, superior to that to which Dr. Haly became entitled by virtue of the agreement. Any person coming into possession of the land would be entitled to hold it at the most on the terms of the agreement. It is obvious, too, that the agreement did not create any relation of tenancy between the officiating Roman Catholic clergyman at the chapel of Luggacurren, for whose residence it was designed, and the Marquis of Lansdowne. The clergyman's position was merely that of a licensee.

The question to be determined turns, I think, upon the true construction of the agreement between the then Marquis and Dr. Haly. It was contended by the learned counsel for the appellants that even if the lands had been used for a purpose

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other than that sanctioned by the agreement this was a breach of trust, and that it was not competent for the respondent to maintain an action in respect of such breach of trust; that a charitable trust (as this was said to be) could only be enforced by the Attorney-General. It is not necessary to discuss this question, inasmuch as in my opinion it was made by the agreement matter of contract between Dr. Haly and the Marquis of Lansdowne that the subject of the demise should be used only as a residence and holding for the Roman Catholic officiating clergyman at Luggacurren.

It is true that by the agreement Lord Lansdowne was to grant and let to Dr. Haly upon trust for that purpose; but the agreement, which is very inartificially drawn, inasmuch as the operative part of it is all expressed by way of a recital, commences with these words: "Whereas the said Marquis of Lansdowne is minded and desirous to provide a suitable residence and holding for the Roman Catholic officiating clergyman at and upon his Lordship's estate and property at Luggacurren, in the Queen's County, and *for that purpose to grant and let*." I think therefore that the agreement was to grant and let for the specified purpose only, and that the application of the premises to any other purpose would be a breach of the agreement.

But then it was contended on behalf of the appellants, that the premises were not being used for any other than the specified purpose, and therefore there had been no breach of the agreement, even supposing the construction which I have put upon it to be the correct one. In considering this contention two things must be borne in mind. In the first place, the right of any particular curate to enjoy the residence and holding was precarious. It would necessarily cease as soon as he ceased to be the officiating clergyman, and the purpose and object of the agreement was that each officiating clergyman, as soon as he became such, should enter upon the enjoyment of the residence and holding—the object being to provide a suitable residence and holding for such clergyman. My Lords, it seems to me clear that an officiating clergyman becoming thus entitled could not be said to enter upon the full enjoyment of the residence and holding if he found a considerable portion of it encumbered by cottages or huts inhabited by a large number of people.

The next consideration to be borne in mind is, that if at any time there ceased to be stationed on the demised lands and premises an officiating clergyman at the chapel of Luggacurren duly appointed by the bishop, the agreement of tenancy (or had the lease been executed the demise itself) was to come to an end. From that time the land would revert absolutely to the Marquis of Lansdowne, and all obligation to pay rent would cease. It is obvious that the condition of the holding throughout the time for which the agreement or demise lasted was a matter of concern to Lord Lansdowne, inasmuch as the payment of rent might at any time cease and the land be thrown back upon his hands. I think, therefore, that the erecting and maintaining these cottages or huts (which obviously could not be immediately removed) was a use of the holding for a purpose other than that stipulated for and an act done in contravention of the agreement. If therefore the erection of the huts had been carried out during the lifetime of Dr. Haly, and with his sanction, I am of opinion that there would have been a breach of the agreement which might have been restrained by injunction, and I have already expressed my opinion that those whose only title is under the agreement cannot have any higher right or be subject to any less liability.

Doubtless for good reasons no distinction was sought to be drawn as regards their liability to be enjoined between the several appellants, and it is not therefore necessary to enter upon a consideration of the respective positions of those against whom the injunction is now directed.

My Lords, for the reasons I have given, I am of opinion that the judgment appealed from must be affirmed, and this appeal dismissed with costs.

LORD MACNAGHTEN :—

My Lords, this case depends upon the true meaning and effect of a written agreement, and upon a very few facts which have been either admitted or proved.

The agreement in question is dated the 1st of May 1839. It

Lord Macnaghten.

was made between Mr. Price, the agent of the then Marquis of Lansdowne, who was the predecessor in title of the present Marquis, of the one part, and the Right Rev. Francis Haly, D.D., then Roman Catholic Bishop of the United Diocese of Kildare and Leighlin, of the other part. The agreement is in these terms: "Whereas the said Marquis of Lansdowne is minded and desirous to provide a suitable residence and holding for the Roman Catholic officiating clergyman at and upon his Lordship's estate and property at Luggacurren, in the Queen's County, and for that purpose to grant and let to the said Right Reverend Francis Haly, in trust for that purpose, and to his successor and successors for the like purpose, all that and those that part of the lands of Luggacurren as late in the possession of the Reverend Bartholomew Cummins, containing by estimation 10A. 1R. 6P., late Irish plantation measure . . . . at the yearly rent of £15 7*s.*, to be paid to the said Marquis of Lansdowne and his heirs by the said Right Reverend Francis Haly, his successor and successors . . . . to hold for and during such time and at all times hereafter as there shall be and remain stationed at and upon the said hereby granted and demised lands and premises an officiating Roman Catholic clergyman at the chapel of Luggacurren, in the parish of Ballyadams, duly appointed by the said Right Reverend Francis Haly and his successor and his successors from time to time, and at all times for ever hereafter, leases to be perfected containing the usual clauses and covenants as are contained and mentioned in the usual leases of the said Marquis of Lansdowne, and also the usual covenants between landlord and tenant at and upon the reasonable request of the said Right Reverend Francis Haly and his successor and successors to the said Marquis of Lansdowne and his heirs."

The agreement was signed and sealed both by Mr. Price and the bishop. Though somewhat informally expressed, it was evidently intended to be a solemn instrument regulating the rights of the contracting parties until the execution of a formal lease, which the bishop alone, according to the terms of the agreement, would be entitled to call for. No request has ever been made for a more formal instrument, and no lease or grant has ever been executed in pursuance of the agreement.

It was admitted that at the date of the execution of the agreement there was a dwelling-house upon the premises, and I think it must be taken that it was the view of both parties to the agreement that the premises in their then state and condition formed a suitable residence and holding for the officiating Roman Catholic clergyman at Luggacurren. Another house was built on the holding in 1842 or 1843. There is no evidence to shew who built it. But even assuming it to have been built by the bishop or through his instrumentality, that circumstance cannot of itself alter the rights of the parties or confer any right upon the present officiating clergyman at Luggacurren.

No evidence was adduced at the trial as to the terms of the leases on the Lansdowne estate at the date of the agreement, or as to the covenants which were then regarded as usual covenants between landlord and tenant, and therefore, as it seems to me, the latter part of the agreement may be put aside.

It will, I think, be convenient to consider the meaning and effect of the agreement before coming to the facts which have given rise to the present question. The object of the agreement as stated upon the face of it was to provide a suitable residence and holding for the Roman Catholic officiating clergyman on the Lansdowne estate at Luggacurren. The mode in which the object was to be effected was this: The bishop was to accept the position and the liabilities of tenant, and the relation of landlord and tenant was to subsist between Lord Lansdowne and his successors in title on the one hand and the bishop and his successors in the bishopric on the other, so long, but so long only, as there should remain stationed upon the premises an officiating Roman Catholic clergyman at the chapel of Luggacurren duly appointed by the bishop for the time being. The bishop however and his successors in the bishopric were not to have any beneficial interest in the tenancy. They were to hold it merely for a defined purpose. As between Lord Lansdowne and the officiating clergyman for the time being it appears to me that it was not the intention of the agreement that there should be any legal relation of any sort. It was evidently intended that the officiating clergyman should be admitted under a revocable licence, and that he should be removable from his residence and holding as he would be removable from his cure at the will and pleasure of the bishop.

Now if that be the true meaning of the agreement, it is obvious that it would be in direct contravention of the contract for the bishop either to assign or underlet the premises or any part thereof, or to part with the possession of the premises or any part thereof to any person except the officiating clergyman for the time being at the Roman Catholic Chapel of Luggacurren. The bishop could not deal with the premises at all for his own benefit. He could only deal with them for the benefit of the officiating clergyman in one particular way, which is defined by the agreement. The holding was not meant to be an endowment for the parish. It was intended for the personal residence and occupation of the officiating clergyman. In like manner it would be in contravention of the contract for the officiating clergyman either to assign or underlet the premises, or to part with the possession of the premises or any part thereof to any person except the bishop. How could the officiating clergyman do that which the bishop himself could not have done? Entering under the agreement, he is bound by all its terms, expressed or implied. If the lease were perfected, holding as he then would hold under a revocable licence, he would have no title at law which could enable him to assign or sublet. And he would be bound to keep the residence and holding as a suitable residence and holding for an officiating clergyman, and in such a condition that on the termination of his own occupation the bishop might be free to hand over the premises as a suitable residence and holding to his successor in office.

The story of what has happened since the agreement was made may be told very shortly. During Dr. Haly's life the arrangement was loyally carried out on both sides. Dr. Haly died in August, 1855, and was succeeded in the bishopric by Dr. Walsh. Dr. Walsh did not take upon himself the burden of the agreement. In fact, it is admitted that when he was applied to on behalf of Lord Lansdowne in reference thereto he disclaimed any interest in the premises. Dr. Walsh died in March 1888, and was succeeded by the present bishop, Dr. Lynch. It is admitted that Dr. Lynch has not interfered with the possession of the premises or the payment of the rent. Since the death of Dr. Haly the rent has generally been paid by the hands of the parish priest. Receipts have been uniformly given for the rent as received "from Reps. Rev. Dr. Haly." This form of receipt, I may observe, is very common in Ireland where a tenant who is entered in the rent-book dies, and is succeeded in the occupation of the holding by a person whom for some reason or other the landlord does not choose to acknowledge as tenant. It has no reference to the legal personal representatives of the deceased tenant. It is simply an acknowledgment of the payment of the rent, and a recognition of the original tenancy.

At the date of the occurrence which led to the dispute between the parties to this action, the appellant, the Rev. John Maher, was in possession of the premises as the officiating clergyman at the chapel of Luggacurren, and he has remained in possession of the greater part of the premises ever since. His immediate superior was, and is, the appellant, the Rev. Thomas Kehoe, who is the parish priest of Ballyadams.

As the bishop does not think proper to take upon himself the burden of the agreement, it appears to me to be clear that if Lord Lansdowne chose to insist on his strict rights, the appellant, the Rev. John Maher, would have no right under the agreement or otherwise to remain in possession of the residence and holding. Mr. Maher is not a yearly tenant or a tenant at all under Lord Lansdowne. He is not responsible for the rent or liable on the covenants. The holding, moreover, is not a holding to which the Land Law (Ireland) Acts of 1881 or 1887 apply. Lord Lansdowne stipulated that he should have the security of the bishop as his tenant, and that the bishop should be responsible for the payment of rent and for the performance of the covenants and conditions of the tenancy. If the bishop will not take upon himself the burden of the agreement, Lord Lansdowne cannot be bound by it. But Lord Lansdowne, who appears to have acted throughout with great forbearance, is still willing to treat the officiating Roman Catholic clergyman at Luggacurren as in possession under the bishop's licence, as contemplated by the agreement; and, inasmuch as the appellants set up no other title, the case must be dealt with on that footing.

I now come to the facts which have given rise to the present question. It appears that in August 1887 a builder named Daniel Carbery descended upon the holding. In the course of two or three months, and at the cost of between £800 and £900, he constructed upon it a town or village consisting of twenty-one detached huts or cottages, covering about one-third of its area. Carbery was originally made a defendant. He was interrogated; but he declined to say by whose orders or under whose direction he acted, upon the ground that answering would tend to criminate him by establishing his complicity in "a certain criminal conspiracy known as the Plan of Campaign." Carbery was examined at the trial, but he was equally reticent there. He would give no information upon the subject beyond stating that he was employed by the Irish National League, a body of which the appellant, Mr. Maher, admittedly was vice-president in the district of Luggacurren. The appellants, Messrs. Kehoe and Maher, sheltered themselves under the same plea, and claimed and obtained the same privilege of silence. But it was not disputed that what Carbery did was done with their sanction and by their permission. Twenty of these huts or cottages were intended for human habitation, and they have been occupied ever since their erection by persons who are said to be evicted tenants, and who are maintained in possession by the appellants. And so the result is that, at the instance or by the permission of the appellants, a large part of the holding has been diverted from the purpose to which it was dedicated by the agreement of 1839, and has been allowed to pass out of the hands of the officiating clergyman at Luggacurren, in contravention of that agreement.

On these facts, at the instance of Lord Lansdowne, the Master of the Rolls made an order upon the appellants and a Mr. Norris for the removal of these huts or cottages, and his order was confirmed on appeal, except as to Norris. My Lords, I think that the order as it stands is right.

On behalf of the appellants much stress was laid on the fact that these huts or cottages are made of wood, and not built into the ground. But as the respondents' counsel did not found their arguments on the doctrine of waste, that circumstance is wholly immaterial.

The learned counsel for the appellants then argued that the erection and maintenance of these huts or cottages were not in contravention of the agreement. For the reasons which I have already given, I think they were. Then they argued that if the acts complained of amounted to a violation of the trust upon which the holding was let, Lord Lansdowne was not the proper person to complain. It was a charitable trust, they said. True, the present bishop has not taken upon himself the burden of the agreement. Still a trust will not fail for lack of a trustee, and the Court, they urged, would, at the instance of the Attorney-General, vest the lands in some proper person, and so carry the charitable trust into execution. But Lord Lansdowne, they said, is not a cestui que trust, and he, at least, cannot interfere. Now I must say I was quite unable to follow this argument. I do not understand how this trust, if it be a charitable trust, could be enforced by the Court at the instance of the Attorney-General. How could the Court compel the bishop to take upon himself the tenancy? How could the Court compel Lord Lansdowne to accept any one as his tenant except the bishop? The present bishop declines to interfere. He is quite within his rights. But if he declines to accept the tenancy there is an end of the matter, and Lord Lansdowne is entitled to the land freed and discharged from the agreement. If the bishop were tenant no one but Lord Lansdowne could enforce the terms of the agreement, for the bishop could put an end to his tenancy at any moment, subject to any existing liability to Lord Lansdowne, by simply withdrawing the officiating clergyman from the premises. And so Lord Lansdowne alone, as being entitled to the immediate reversion, would be in a position to call upon the Court to interfere by injunction.

Then it was said that even if the erection of these cottages was in contravention of the agreement, and if Lord Lansdowne is in a position to complain, yet his complaint ought not to be listened to, because the act complained of is really no injury to him. That, to my mind, is a very singular contention. If there were a lease, or if the bishop had taken upon himself the tenancy, the bishop could have put an end to it at any moment. As it is, the officiating clergyman may leave to-morrow: Lord Lansdowne has no hold over him whatever. And yet it was gravely argued that on the termination of the agreement, instead of getting back his property in the condition in which it would have been if the agreement had been honestly carried out, Lord Lansdowne must be content to have it thrown upon his hands burdened with twenty-one cottages and their inhabitants. He let an agricultural holding; he must take back a congested district. "Oh," said the leading counsel for the appellants, "these cottages can be easily removed; they need not subsist a day longer than anybody likes; they have only to be raised from the ground and thrown aside." Well, that is a summary mode of eviction which would not, I should think, commend itself to any landlord in Ireland, and which I am sure the appellants themselves would hesitate to put in force. The learned counsel who spoke second for the appeal took a more practical view; he admitted that if the land were returned to Lord Lansdowne with these cottages upon it he could only get rid of them by actions of ejectment. Everybody knows what that means—expense and delay and odium! And all the time while the landlord was vindicating his rights, and probably for a very long time afterwards, the land would lie idle and unprofitable. To my mind, that is a grave injury as well as an imminent danger; and it is an injury flowing directly from acts done by the permission of both the appellants in plain contravention of the agreement under which one of them, the officiating clergyman of the Roman Catholic Chapel at Luggacurren, claims to be entitled to the possession of the premises.

I think that the appeal must be dismissed, with costs.

Lord Watson:—

My Lords, I concur in the motion which has been proposed by the Lord Chancellor.

The decision of this appeal is obviously dependent upon the just construction of the agreement of the 1st of May 1839, in so far as it relates to the quality of the right of occupancy which it gives, not to the immediate tenant, but through him to the

Lord Watson.

Roman Catholic clergyman officiating, for the time being, at the chapel of Luggacurren.

Upon that question of construction the views which I entertain are in exact accordance with the opinions expressed by the Lord Chancellor and Lord Macnaghten, whose judgments I have had the advantage of studying in print. On consideration, I do not find that I can usefully add anything to what has been already so well said by my noble and learned friends, and I shall therefore abstain from attempting to do so.

Lord Shand, who is unable to be present to-day, has requested me to state his concurrence in the judgment of the House.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 4th August 1893.

Solicitors for appellants: *Clay & Close, for V. & P. J. Kilbride, Dublin.*

Solicitors for respondent: *Cookson, Wainwright, & Pennington, for Thomas C. Franks, Dublin.*

[HOUSE OF LORDS.]

H. L. (E.)
1893
Aug. 4.

THE MERSEY DOCKS AND HARBOUR BOARD . . . . } APPELLANTS.

AND

WILLIAM H. TURNER, ON BEHALF OF HIMSELF AND ALL OTHERS THE OWNERS OF THE SS. "ZETA." . . . . } RESPONDENTS.

THE "ZETA."

Admiralty—Damage to Ship—Negligence of Dock Official—County Court—Jurisdiction—The County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71) *s.* 3—*The County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51) *s.* 4.

The County Courts Admiralty Jurisdiction Amendment Act 1869 s. 4, provides that the jurisdiction given by sect. 3 of the County Courts Admiralty Jurisdiction Act 1868 to county courts having Admiralty jurisdiction shall extend to all claims not exceeding £300 for damage to ships, whether by collision or otherwise :—

Held, reversing the decision of the Court of Appeal ([1892] P. 285) and restoring the decision of Sir C. Butt ([1891] P. 216), that this jurisdiction includes a claim for damage to a ship by collision with an object which is not a ship, e.g. a pierhead.

Semble, that when those Acts were passed the Admiralty Court had jurisdiction over such a claim.

APPEAL from an order of the Court of Appeal (1).

The respondent on behalf of himself and all others the owners of the steamship *Zeta* brought an action in personam in the Probate, Divorce and Admiralty Division against the appellants for damages to the *Zeta* caused by her collision with the pierhead of an inner dock at Liverpool belonging to the appellants. The President of that Division (Sir Charles Butt), who tried the action with the assistance of two of the Elder Brethren, found that the damage was caused by the negligence of the dock officials, and pronounced in favour of the plaintiff's claim and condemned the defendants in damages and referred the damages to the Registrar, but in view of sect. 9 of the County

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(1) [1892] P. 285.

Courts Admiralty Jurisdiction Act 1868, made no order as to costs (1). The damages claimed and allowed were between £200 and £300.

The refusal of the President to certify for costs under sect. 9 of the Act of 1868 was upon the ground that under sect. 3 of that Act as amended by sect. 4 of the Act of 1869 the action might have been brought in a County Court. The Court of Appeal (Lord Esher M.R. and Lopes L.J., Fry L.J. dissenting) allowed the appeal from so much of the judgment of Sir Charles Butt as related to costs and condemned the defendants in the costs of the action and of the appeal (2).

By sect. 3 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) "Any County Court having Admiralty Jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty Causes): . . . .

"(3.) As to any claim for damage to cargo or damage by collision—Any cause in which the amount claimed does not exceed three hundred pounds."

By sect. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51) "The third section of the County Courts Admiralty Jurisdiction Act 1868 shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."

By sect. 6 of the Admiralty Court Act 1840 (3 & 4 Vict. c. 65) "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered, or damage received, or necessaries furnished, in respect of which such claim is made."

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(1) [1891] P. 216.

(2) [1892] P. 285.

May 1, 2. *T. G. Carver* and *A. H. Maxwell* for the appellants:—

The question depends upon the extent of the Admiralty jurisdiction conferred on county courts by the Act of 1868, s. 3, which gives to certain Courts jurisdiction to try claims for damage by collision when the amount claimed is not more than £300, and sect. 4 of the Act of 1869, which extends the jurisdiction to all claims for damage to ships. In *Everard* v. *Kendall* (1) the damage by collision was confined to ships, and held not to extend to barges. And see *The Dowse* (2) and *Allen* v. *Garbutt* (3) with respect to claims for necessaries. So *Reg.* v. *Judge of the City of London Court* (4) decided that, as the High Court of Admiralty had no jurisdiction to entertain an action in personam against a pilot for a collision, so the county court had no such jurisdiction, and the Acts of 1868 and 1869 gave the county courts no greater jurisdiction, except with regard to charterparties, than was possessed by the Admiralty Court. These cases may seem to be against the appellants; but in *Cargo ex Argos* (5) it was held that sect. 2 of the Act of 1869 gave the county courts jurisdiction in cases where the Admiralty Court had no original jurisdiction. The Act of 1869, s. 4, has clear words which give the county courts jurisdiction in "all claims for damage to ships"—words which cannot be limited. There was, moreover, full jurisdiction in the Admiralty Court over damage to ships, independently of the statute 3 & 4 Vict. c. 65. If the pier had been damaged by the ship, the Admiralty Court would have had jurisdiction; then why not, when the ship is damaged by the pier? The words in the Act of 1869, "in the nature of" damage, are stronger than the words "for damages," and include consequential as well as direct damage. Under the Act of 1840 (3 & 4 Vict. c. 65), which is only supplemented and explained by sect. 7 of the Admiralty Jurisdiction Act 1861, by which the Admiralty Court has jurisdiction over any claim for damage done by a ship, a long series of cases have been decided. Damages have been given for—(1.) Collision with a sunk ship improperly lighted: *The Douglas* (1); (2.) With a keel: *The Sarah* (2); (3.) With a barge: *Purkis* v. *Flower* (3); (4.) Where a ship ran over her own anchor in consequence of the harbour-master's negligence: *The Rhosina* (4); (5.) Where one vessel ran against a wall in consequence of another vessel's negligence: *The Industrie* (5); (6.) Where one ship, by negligence of a second ship, did injury to a third: *The Sisters* (6); (7.) Damage done by a ship to a barge: *The Malvina* (7); (8.) Damage done inside a dock by collision between a ship and a barge: *Reg.* v. *Judge of City of London Court* (8); (9.) Damage to a breakwater: *The Uhla* (9). In *The Robert Pow* (10), it was held that the Court of Admiralty has not jurisdiction for damage caused by the vessel's taking the ground. But see comments in Williams and Bruce's Admiralty Practice, 2nd ed. p. 73, on this case. *The Nightwatch* (11) was a case of damage done by a steam-tug, and within the jurisdiction of the Admiralty Court. The Master of the Rolls below relied on *The Ida* (12), in which it was held that the Court has jurisdiction over cases of collision, but not of damage generally. But the main point in the case of *The Ida* (12) was that the parties were foreigners, and the cause of action arose in a foreign river. *The Excelsior* (13) was held liable for damage done to a wharf. In *The Clara Killam* (14) a ship was held liable for damage done to a telegraph cable. A case of damage done by a ship to a mooring dolphin was heard: *The Albert Edward* (15).

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(1) Law Rep. 5 C. P. 428.

(2) Law Rep. 3 A. & E. 135.

(3) 6 Q. B. D. 165.

(4) [1892] 1 Q. B. 273.

(5) Law Rep. 5 P. C. 134.

The Act of 1840 did not extend, except in area, the jurisdiction of the Court of Admiralty. The ancient jurisdiction was over all torts by subjects of the Crown on the high seas. The theory of the common lawyers was that all matters arising outside the jurisdiction of the common law were inside that of the Court of

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(1) 7 P. D. 151.

(2) Lush. 549.

(3) Law Rep. 9 Q. B. 114.

(4) 10 P. D. 24, 131.

(5) Law Rep. 3 A. & E. 303.

(6) 1 P. D. 117.

(7) Lush. 493; in P. C., Brown. & Lush. 57.

(8) 8 Q. B. D. 609.

(9) Law Rep. 2 A. & E. 29, n.; 3 Asp. M. L. C. (O.S.) 148.

(10) Brown. & Lush. 99.

(11) Lush. 542.

(12) Lush. 6.

(13) 3 Asp. M. L. C. (O.S.) 151.

(14) Law Rep. 3 A. & E. 161.

(15) 44 L. J. (Adm.) 49.

Admiralty: 4 Inst. 134–5, citing 13 Rich. 2, c. 5, and 15 Rich. 2, c. 3, and 2 Hen. 4, c. 11. Coke cites cases in which double damages were given in the Admiralty Courts against plaintiffs who had proceeded in the Common Law Courts. But there is no case of prohibition against the Admiralty Court for exercising jurisdiction on the high seas. There are, it is true, no regular reports of Admiralty cases until the end of the last century; but there is nothing in the history of the Court to suggest that its jurisdiction was limited to collisions between ships.

Among the older authorities on the Admiral's jurisdiction may be cited *Sir H. Constable's Case* (1), in which the Court of Admiralty was said to have jurisdiction of flotsam, jetsam, and lagan, but not of wreckage: 3 Blackstone's Commentaries, book iii. p. 106. The theory was that the Admiral came in to supply the want of jurisdiction of the common law. *Goodwin* v. *Tomkins* (2) was an action of trespass; *Martin* v. *Green* (3) was for collision; *Sheers & Norlay* v. *Martyn* (4) shews that the Admiral exercised jurisdiction in cases of nuisances on navigable rivers. In *Crosse* v. *Bigs* (1664) (5) the Admiral was said to have jurisdiction over beacons. Much curious learning may also be found in Sheppard's Abridgment of the Law (1675) p. 128; and in Sheppard's Epitome (1656), p. 361. In Sir William Burrell's Reports of Admiralty Cases (1758–1774) and Extracts from the Books and Records of the Courts of Admiralty and Delegates (1584–1839), edited by Marsden, cases illustrating the ancient jurisdiction are given. *Fairless* v. *Thorsen* (6) was a case where damage done by a ship in the Thames was held within the jurisdiction: Cf. *The Sarah* (7). In *Clarke* v. *Scattergood—The Warewell and the Susan* (1663) (8), and in *Tills* v. *The Mary* (1703) (9), damage done by an unbuoyed anchor in the Thames was held within the Admiral's jurisdiction.

Among the American cases *De Lovio* v. *Boit* (1815) (10) decides that the Admiralty Courts have jurisdiction over all maritime contracts and all torts on the high seas and in ports and harbours within the ebb and flow of the tide. In *Philadelphia &c. Railroad Company* v. *Philadelphia and Havre de Grace Steam Towboat Company* (1859) (1) the jurisdiction was decided to include damage to navigation by the driving of piles in a river.

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(1) 5 Rep. 106a (vol. iii. p. 214).
(2) Noy, 148.
(3) 1 Keb. 730.
(4) 1 Keb. 789.
(5) 1 Keb. 575.
(6) Burrell, 130.
(7) Lush. 549.
(8) Burrell, 243.
(9) Burrell, 284.
(10) 2 Gallison, 398.

In *The Hercules* (2) Sir W. Scott, at p. 371, said that the Admiralty Court had originally jurisdiction over all transactions at sea. Among modern cases *The Sylph* (personal injuries) (3), *The Ruckers* (1801) (assault upon a passenger) (4), *The Agincourt* (1824) (cruelty to one of the crew) (5), *The Lowther Castle* (excessive punishment) (6), *The Enchantress* (assault and cruelty) (7), *The Beta* (personal injury) (8)—all support the old common law theory laid down in Blackstone of the Admiralty jurisdiction. *Richardson* v. *Locklin* (9) shews the analogy to a nuisance on the highway for which the action was local. The whole of the criminal jurisdiction on the high seas was in the Admiralty and its procedure in personam. In *Reg.* v. *Judge of the City of London Court* (10) a collision in a dock was held to be within the Act of 1861.

Joseph Walton Q.C. and *Butler Aspinall* for the respondents:—

The County Court Acts conferred no jurisdiction beyond that possessed by the Court of Admiralty, and the present action was not within that jurisdiction. At the date of the Act of 1840 the jurisdiction of the Court of Admiralty in personam had become obsolete. This view is expressed in *Reg.* v. *Judge of the City of London Court* (11); see Marsden on Collisions, 3rd ed. p. 86, where the cases are collected.

[LORD HERSCHELL L.C. referred to *The Leda* (12).]

In *The Clara* (1855) (13) Dr. Lushington, at p. 3, says: "The proceeding by arrest of the person has now for many years been

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(1) 23 Howard, 209.
(2) 2 Dodson, 353.
(3) Law Rep. 2 A. & E. 24; 3 Asp. M. L. C. (O.S.) 37.
(4) 4 Ch. Rob. 73.
(5) 1 Hagg. Adm. 271.
(6) 1 Hagg. Adm. 384.
(7) 1 Hagg. Adm. 395.
(8) Law Rep. 2 P. C. 447.
(9) 6 B. &. S. 777; 34 L. J. (Q.B.) 225.
(10) 8 Q. B. D. 609.
(11) [1892] 1 Q. B. 273, 303–305.
(12) Brown. & Lush. 19–26.
(13) Swab. Adm. 1.

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obsolete—I cannot exactly say how long, but I think there was a precedent in 1780." The remedy in personam was by arrest of the person. By 17 & 18 Vict. c. 78, s. 13 the Court was to proceed by "monition" instead of warrant in suits against ship, freight, goods or other effects. The mere absence of attempts to prohibit such an action as this, is, as Kay L.J. said in *Reg.* v. *Judge of City of London Court* (1), evidence that no such action was ever brought; and he cites *The Urania* (2) to shew that no action in personam would lie against a pilot for collision. See also Edwards's Admiralty Jurisdiction, 151, et seq. The only new jurisdiction conferred on county courts is in sect. 2 of the Act of 1869, by which charterparties are included in the Admiralty jurisdiction: *Cargo ex Argos* (3). Since then a County Court Act has been passed and rules dealing with Admiralty cases made, but no alteration of the law was made, although at that time there had been decisions that, with the exception of sect. 2 of the Act of 1869 dealing with charterparties, no greater jurisdiction had been conferred than previously existed in the Court of Admiralty. By sect. 6 of the Act of 1840 (3 & 4 Vict. c. 65) the causes of action enumerated are salvage, damage, towage, and necessaries. By sect. 7 of 24 Vict. c. 10 the High Court of Admiralty has jurisdiction over any claim for damage done by any ship. The remedy was in rem, and "damage" had a strictly technical meaning and was confined to collision. An action for breach of contract was unknown in the Admiralty. The jurisdiction of the Admiralty Court reached its highest point under the Commonwealth. The ordinance passed on the 12th of April 1648 considerably enlarged the scope of its powers. But this ordinance was set aside at the Restoration as of no validity, and a bill to give it legal effect was thrown out. The Court then fell into a feeble condition: see Williams and Bruce's Admiralty Practice (2nd ed.) pp. 12, 13. In Pepys' Diary, the 17th of March 1663, Justice was described by the Admiralty judge of that day as having two wings, one of which spread itself over the land, and the other (the Admiralty Court) over the water. This action is for negligence on land, and is not a matter on the high seas; and such an action was never within the cognizance of the Admiralty. Nineteen judges have expressed their concurrence with *Everard* v. *Kendall* (1), in which it is stated that the Acts of 1868 and 1869 give no wider jurisdiction to county courts than belonged to the Court of Admiralty. *Seward* v. *Vera Cruz* (2) limits the generality of the words in sect. 7 of the Act of 1861. See especially Lord Blackburn's observations at pp. 71–2.

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(1) [1892] 1 Q. B. 273, at p. 311.

(2) 10 W. R. 97.

(3) Law Rep. 5 P. C. 134.

Carver, in reply:—

The Henrich Björn (3) and *The Sara* (4) conclusively shew that the remedy in personam is not obsolete. To enforce a maritime lien no doubt it was necessary to arrest the ship. But the remedy in rem is not confined to cases of maritime lien. There are abundance of "res" of the appellants against which such a judgment could have been enforced. With respect to the pilots' cases, there is doubtless no general jurisdiction in tort committed on the high seas, as is shewn by *The Urania* (5); but in *The Alexandria* (6) Sir R. Phillimore, whilst he followed *The Urania* (5), said that if the matter were res integra he should have held that the Court had jurisdiction to entertain the suit. The claim in *The Alexandria* (6) was under the Act of 1861, which expressly gives a remedy in personam as well as in rem. The Act of 1840 clearly gives jurisdiction in all cases: in "all claims and demands whatsoever in the nature of damage received by a ship."

The House took time for consideration.

Aug. 4. LORD HERSCHELL L.C.:—

My Lords, the question in controversy between the parties to this appeal is whether the late learned President of the Admiralty Division (Sir Charles Butt) was justified in depriving the respondent of his costs, although he was successful in the action which he brought against the appellants, on the ground that the action might and ought to have been brought in the county

(1) Law Rep. 5 C. P. 428.
(2) 10 App. Cas. 59.
(3) 11 App. Cas. 270.
(4) 14 App. Cas. 209.
(5) 10 W. R. 97.
(6) Law Rep. 3 A. & E. 575.

court. The sum in dispute is not large, but the question involved as to the extent of the county court jurisdiction in Admiralty cases is one of general importance. The cause of action which the respondents established was that their vessel had sustained damage owing to a collision with the dock wall of the appellants, such collision being due to the negligence of the appellants' servants, whose orders the master of the vessel was at the time bound to obey. The amount sought to be recovered exceeded £200, and it is common ground that unless the County Courts Admiralty Jurisdiction Acts conferred jurisdiction on the county court to try the case, the respondent was not entitled to maintain an action in that Court.

It is contended in the first place on behalf of the appellants, that whether the action is one which it was competent for the Court of Admiralty to entertain or not, it is within the jurisdiction conferred upon the county courts by the County Courts Admiralty Jurisdiction Acts. This depends upon the construction of sect. 3 of the County Courts Admiralty Jurisdiction Act 1868, as amended by sect. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869.

I think it is impossible to read sect. 3 of the Act of 1868, in conjunction with the other provisions of that Act, without seeing that its purpose was to confer on certain county courts the jurisdiction exercised by the Court of Admiralty, with a limit of amount exceeding that fixed in the case of common law actions. In my opinion it was not intended to do, and cannot reasonably be construed as doing, more than this. If this construction be correct, I think it follows that sect. 4 of the Act of 1869 has not any wider scope. Full effect can be given to the language used without holding that it conferred upon the county courts having Admiralty jurisdiction the power to try all claims for damage to ships, even though they were not cognisable by the Court of Admiralty, up to £300. The decision of the Court of Appeal in the case of *The Alina* (1) does not, I think, tend to establish the proposition that so extended a jurisdiction was conferred, or to impair the authority of the decisions as to the scope of sect. 3 of the Act of 1868. Sect. 2 of the Act of 1869, upon which that

(1) 5 Ex. D. 227.

decision turned, provided that any county court appointed at any time to have Admiralty jurisdiction should have jurisdiction to try and determine certain specified causes. The 4th section, which is now in question, provides merely that sect. 3 of the County Courts Admiralty Jurisdiction Act 1868 shall "extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed £300."

I need not more fully explain the reasons which have led me to the conclusion I have indicated, agreeing as I do with the views expressed as to the construction of the statutory provisions now in question by the Court of Appeal in the case of *Reg.* v. *Judge of the City of London Court* (1).

The appellants, however, insist that the present case is one within the jurisdiction of the Admiralty Court. They contend in the first place that such jurisdiction was conferred by sect 6 of the Admiralty Court Act 1840. That section is in the following terms: "6. And be it enacted, That the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered, or damage received, or necessaries furnished, in respect of which such claim is made." The words "damage received by any ship or sea-going vessel" are certainly as wide as could well be conceived, and, regarding the language of the statute alone, apart from other considerations, I do not think it would be possible to entertain a doubt that the present case was within it.

In the year 1861, by sect. 7 of 24 Vict. c. 10 (the Admiralty Court Act 1861), it was enacted that the Admiralty Court should have jurisdiction over any claim for damage done by any ship. The construction of this section has frequently come before the Courts. It was first considered in the case of *The Malvina* (2) in the year 1862. That was an action by the owner of a barge against the owners of a steamer for damage sustained by the former owing to a collision. There was a plea to the jurisdiction upon the ground that the barge was not a ship or sea-going vessel, and that the collision took place within the body of a county. It was held by the Court of Admiralty that the Act of 1861 conferred jurisdiction to entertain the suit, and this decision was affirmed by the Privy Council.

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(1) [1892] 1 Q. B. 273.

(2) Lush. 493; in P. C., Brown. & Lush. 57.

In the case of *The Uhla* (1), a cause of damage by the Falmouth Dock Company for injury done to a breakwater by driving against it was held to be within the jurisdiction of the Admiralty Court. The same decision was arrived at in the case of *The Sylph* (2), where a diver had received personal injuries by being struck with a paddle-wheel. It is not necessary to trouble your Lordships with all the cases. It is enough to say that the proposition that the Act of 1861 applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to question.

It would be a strange result if, in the case of a ship striking against a dock wall, the Court of Admiralty had jurisdiction to entertain a claim for damage done to the dock wall by the ship, and not for damage done to the ship by its contact with the dock wall.

It is said, however, and truly, that the words "damage received by any ship" in the statute of 1840 have received a more limited construction than the words "damage done by any ship" in the Act of 1861, and the respondent naturally relies upon the decision of Dr. Lushington in the case of *The Robert Pow* (3) in the year 1863. That action was brought in respect of the damage sustained by a vessel which took the ground owing to the negligence of the steam-tug which was towing her. Dr. Lushington called attention to the fact that there was no collision of any kind between the two vessels, and laid down that the word "damage" in the statute must be taken, according to the well-understood meaning of the phrase in the Admiralty Court, to be confined to damage done by collision. He stated that the purpose of the section was to extend the ordinary jurisdiction of the Court to waters within the body of a county. It is to be observed that he also said, that for a similar reason the Court could not proceed under sect. 7 of the Admiralty Court Act 1861, inasmuch as "damage" meant there, as in the former statute, "damage done by collision." If he meant (as apparently he did) damage done by collision between two ships, the view which he expressed as to the Act of 1861 has not been followed.

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(1) Cited in the notes to *The Sylph*, Law Rep. 2 A. & E. 29, n. and more fully reported in 3 Asp. M. L. C. (O.S.) 148.

(2) Law Rep. 2 A. & E. 24; 3 Asp. M. L. C. (O.S.) 37.

(3) Brown. & Lush. 99.

The learned judge himself decided the contrary in the case of *The Uhla* (1). In his judgment he said that he had been somewhat staggered by the case cited of *The Robert Pow* (2); but on looking at it he found that it did not affect the case then before him.

The learned counsel for the appellants impeached the decision of Dr. Lushington in the case of *The Robert Pow* (2). They contended in the first place that the ample words of the statute of 1840 ought not to be controlled in the manner suggested, so as to limit their application to damage caused by collision; and, in the next place, that the jurisdiction of the Admiralty Court, in relation to matters arising on the high seas, was not confined to claims for damage arising from a collision between two vessels.

The case now before your Lordships was elaborately and fully argued, and a review of the judicial opinions bearing on this contention, to which the learned counsel called attention, is enough to shew that the questions to be determined are by no means free from difficulty or doubt. It is impossible to reconcile all the opinions which have proceeded from the Bench from time to time, and in the present case Fry L.J., differing from the two other members of the Court of Appeal, agreed with the late President of the Admiralty Division.

I think it will be convenient, in the first place, to consider whether the proposition which formed the basis of Dr. Lushington's judgment in the case of *The Robert Pow* (2), that cases of damage by collision (by which, as I have said, I think he meant collision

(1) Law Rep. 2 A. & E. 29, n.; 3 Asp. M. L. C. (O.S.) 148.
(2) Brown. & Lush. 99.

between two ships) were alone within the jurisdiction of the Court of Admiralty at the time the statute of 1840 became law, can be maintained.

I may observe at the outset that it is difficult to understand if "damage" had, as suggested, a well-understood meaning sufficient to authorize or indeed render necessary a restriction of the words "damage received" in sect. 6 of the Act of 1840, why a similar restriction of the words "damage done" in the Act of 1861 was not equally requisite. As I have already pointed out, the learned judge did, in his judgment in the case of *The Robert Pow* (1) state that the same restriction ought to be applied in construing both statutes; but as regards the statute of 1861 he afterwards deliberately receded from this position.

The case of *The Sarah* (2) was decided by the same learned judge in the year previous to the decision of the case of *The Robert Pow* (1), and the law laid down was certainly very different. In that case a schooner was damaged by a collision with the keel *Sarah.* The owner of the keel appeared under protest to the jurisdiction, the objection being that the *Sarah* was not a ship or boat; that the Court had therefore no jurisdiction under the Act of 1861, and that it could not entertain the suit under its ordinary jurisdiction. Dr. Lushington said: "The Court has original jurisdiction, because the matter complained of is a tort committed upon the high seas. It is not necessary to refer to any statute, and it is immaterial whether the vessel doing the damage was a sea-going vessel; immaterial also by what means it was navigated." The protest was accordingly dismissed.

It seems to me impossible to reconcile this statement of the law and the decision in this case with the ratio decidendi in the case of *The Robert Pow* (1), for it is difficult to see why if the Court had inherent jurisdiction to deal with damage caused to a ship through its coming into contact with a keel, damage resulting to a ship from its being forced into contact with the ground should be outside its jurisdiction.

It is said that in the case of *The Ida* (3), decided in 1860 (tw years before *The Sarah* (1)), Dr. Lushington stated the law very differently. The facts of that case were peculiar. The master of a Danish ship moored at Ibraila, inside an English ship, cut the latter adrift, whereby she collided with a barge containing part of her cargo belonging to Turkish owners. Dr. Lushington held that the Court had no jurisdiction, the cause being between foreigners as to acts done in a foreign river; and, further, that the act complained of was not due to the ship proceeded against, but to the wholly unwarrantable act of her master, a foreigner in a foreign port. So far the decision is quite irrelevant to the point under discussion; but Dr. Lushington, in the course of his judgment, said: "The Court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only, and this is no collision in the proper sense of the term." If I am to estimate the relative weight of these conflicting statements of the law, it seems to me that the view expressed in the later case of *The Sarah* (1) is more important and authoritative. It was the ground and the sole ground upon which the Court assumed jurisdiction and rejected the protest. It may not have been necessary to go the length of asserting jurisdiction in the case of damage caused by all torts committed upon the high seas, but it was essential that the jurisdiction should cover something more than damage caused by collision between ships.

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(1) Brown. & Lush. 99.

(2) Lush. 549.

(3) Lush. 6.

My Lords, when I turn to prior authorities (and I have examined every one which the researches of the learned counsel brought to the notice of the House), I can find no authority which supports the limitation of the jurisdiction of the Court of Admiralty laid down in the cases of *The Ida* (2) and *The Robert Pow* (3). I do not propose to examine with any minuteness all the authorities which were cited, or to dwell upon the controversy which was carried on between Common Law judges and the Court of Admiralty as to the extent of the jurisdiction of that Court. It is certain that attempts were made to encroach upon the functions of the Common Law Courts, and to entertain suits relating to matters arising, not upon the high seas, but within the body of a county. On the other hand, it is by no means clear that the Courts of Common Law did not sometimes seek, by means of prohibitions, to oust the jurisdiction of the Admiralty Court in matters which were lawfully within its functions.

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(1) Lush. 549.
(2) Lush. 6.
(3) Brown. & Lush. 99.

In the eighth year of James I., complaint was made to the King by the Lord High Admiral concerning prohibitions granted to the Court of Admiralty, and the complaint with the answers of the judges is to be found in the Fourth Institute, 134.

The answer to the first complaint is in these terms: "We acknowledge that of contracts, pleas, and querels, made upon the sea, or any part thereof which is not within any county (from whence no trial can be had by twelve men), the Admirall hath, and ought to have, jurisdiction."

And in the 3rd vol. of Blackstone's Commentaries (106) the law is thus stated: "Admiralty Courts have jurisdiction and power to try and determine all maritime causes; or such injuries, which though they are in their nature of common law cognizance, yet being committed upon the high seas, out of the reach of our ordinary Courts of Justice, are therefore to be remedied in a peculiar Court of their own. . . . As the Courts of Common Law have obtained a concurrent jurisdiction with the Court of Chivalry with regard to foreign contracts, by supposing them made in England, so it is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the Royal Exchange, or other inland place, in order to draw the cognizance of the suit from the Courts of Admiralty to those of Westminster Hall."

There can be no doubt that after the fiction was introduced to which Blackstone refers, any jurisdiction which the Court may have previously exercised in relation to contracts made upon the high seas fell into disuse, and it would be outside the present purpose to inquire what jurisdiction the Court of Admiralty possesses in relation to contracts. Your Lordships are at present only concerned with its jurisdiction as regards torts. The fiction to which reference has been made was made use of, not only in cases of contract, but also in those cases of tort which were in their nature transitory. This may be supposed to account for the fact that torts committed on the high seas came for adjudication for the most part to the Common Law Courts at Westminster; but it seems certain that the jurisdiction of the Admiralty Court in cases of tort was not confined in practice to those which involved a collision between two ships.

In the case of *The Ruckers* (1), decided in 1801, the cause of damage was in respect of a personal assault by the master of the vessel on a passenger. The libel was admitted after objection. The registrar having been directed to look into the practice of the Court, he reported that he had searched the records as far back as 1730; that many instances were to be found of proceedings on damage on behalf of persons described as of the ship's company against officers or others belonging to the same ship; and several against persons belonging to other ships; that there were other instances of proceedings on the part of A. B. against C. D. without any specification of the capacity in which the persons stood. Sir William Scott, who spoke of the action as being "in a cause of damage," said that, looking to the locality of the injury, that it was done upon the high seas, it seemed to be fit matter for redress in that Court; that if research had shewn that the precedents had been only such as related to persons in the capacity of mariners he should have been unwilling to appear to extend the jurisdiction, though perhaps unable to assign any legal ground for such a limitation; but having regard to the report of the registrar he received the libel.

There have been, since that date, several cases in which damages have been awarded to seamen in respect of assaults and ill-treatment by the master. Three such cases, decided by Lord Stowell, are reported in 1 Haggard's Admiralty Reports, at pp. 271, 384, 395. These cases seem to shew that the word "damage" had not, in the practice of the Admiralty Court, invariably the limited meaning attributed to it by Dr. Lushington in the case of *The Robert Pow* (2) and that the jurisdiction of that Court was not confined within the narrow limits suggested.

The views expressed by Lord Stowell in the case of *The Hercules* (3) are also important. That was a proceeding to

(1) 4 Ch. Rob. 73.
(2) Brown. & Lush. 99.
(3) 2 Dodson, at p. 371.

obtain restitution of the proceeds in the hands of the Court of Admiralty of property which had been practically taken. Sir William Scott delivered himself thus, as to the jurisdiction of the Court: "Now, that this Court had originally cognizance of all such wrongs, in short, of all transactions, civil and criminal, upon the high seas, in which its own subjects were concerned (and the present parties complained of are so described), is no subject of controversy, for all history of English law supports it. In the reign of King Henry VIII. (28 H. 8 c. 15) its criminal jurisdiction was in a great part removed by statute to a mixed commission, where it still continues to reside. But that was the only part so removed. All the civil authority remained as before, for neither that statute nor any other affected it. All practice of its civil authority since that enactment proves the existence of the same practice before, for nothing occurred to give it new powers. All theory regarding the constitution of the Court establishes the conclusion that it must have been so."

In addition to cases of personal damage by assault, and the case which I have just referred to, Mr. Marsden's edition of Sir William Burrell's Reports (at pp. 243, 284) supplies a record of two other cases which appear to me of considerable importance.

I am not quite sure that I appreciate the doubt which the Master of the Rolls seems to cast upon the authority of the decisions so recorded, or the manner in which he deals with them in his judgment in the present case. One of the decisions so recorded by Mr. Marsden is a sentence made in a suit by the owners of the *Warewell* against the owners of the *Susan* to recover damages for injury to the *Warewell* and her cargo by the anchor of the *Susan*, which was unbuoyed, and upon which the *Warewell* grounded as she lay at anchor in the Thames. The other is a case in which the owners of the *Hopewell* and her cargo obtained a decree against the *Mary* for their loss by grounding upon the anchor of the *Mary*, which was unbuoyed. These cases appear to me to indicate the exercise by the Court of Admiralty of jurisdiction in cases of damage received by ships from their collision with foreign objects, owing to the wrongful acts of the owners of those objects. In these cases the injury appears to have occurred in the Thames; but I do not see that this could have conferred jurisdiction if it would not have existed in case the disaster had happened outside territorial waters.

My Lords, some light is, I think, thrown upon the question of Admiralty jurisdiction by a study of the cases in which prohibitions were issued by the Common Law Courts. They were frequently granted upon the ground that the wrong complained of arose, not on the high seas, but within the ordinary jurisdiction of the common law; but no case was cited to your Lordships in which a prohibition had been granted to restrain the exercise of jurisdiction by the Admiralty Court in relation to a wrong committed upon the high seas.

It is not necessary in the present case to determine the bounds of the jurisdiction exercisable by the Court of Admiralty as regards torts committed on the high seas. It is enough to say that I cannot regard it as established that in the year 1840 its jurisdiction in the case of damage received by a ship was limited to damage received by collision with another vessel. I can find no ground either on principle or authority, for such a limitation. Nor is it necessary to decide whether the Court of Admiralty possessed jurisdiction in a case similar to the present prior to the Act of 1840, supposing the damage had been sustained upon the high seas. For the reasons I have stated I have come to the conclusion that it is impossible to maintain the proposition that the word "damage" was, according to the well-understood meaning of the phrase in the Admiralty Court, confined to damage due to collision between two ships. This proposition was the sole justification alleged, and I can see no other for giving to the language of that statute the very restricted interpretation adopted by Dr. Lushington. Even if its operation, when the words are construed according to their natural meaning, be to enlarge the jurisdiction of the Court of Admiralty in the case of damage received by a ship upon the high seas, there is nothing in the frame of the enactment to indicate that this was not the intention of the Legislature, though, no doubt, its chief object may have been to extend the jurisdiction which existed in the case of damage received by ships upon the high seas to damage received in the body of a county. It does not provide in terms for an extension, to cases where the occurrence is within the body of the county, of the jurisdiction which would exist if the occurrence had been upon the high seas; but it gives jurisdiction in certain cases "whether the ship may have been within the body of a county or upon the high seas."

It is to be observed that the learned judges who formed the majority in the Court below concurred in thinking that the 4th section of the County Courts Act 1869, only conferred jurisdiction on the county courts where the Court of Admiralty already had jurisdiction. Yet that statute extends the jurisdiction of the county courts, under the Act of 1868, "to all claims for damage to ships by collision *or otherwise*." If the decision that the operation of the enactment in the Act of 1869 is thus limited be sound, it would be difficult to conceive a more emphatic declaration of the Legislature that the Court of Admiralty had jurisdiction in cases of damage to ships other than those arising from collision.

My Lords, I do not think it necessary to discuss the case of *Reg.* v. *Judge of the City of London Court* (1), or other cases in which it was held that the Court of Admiralty had not jurisdiction to entertain a suit for damage caused by the wrongful act of the pilot. In that and the other cases, relating to suits instituted in respect of the negligence of pilots, stress was laid on certain considerations which do not touch the case with which your Lordships have to deal; and I agree with Fry, L.J., in thinking that the decision in *Reg.* v. *Judge of the City of London Court* (1) was not decisive of the present case. At the same time I am, of course, aware that the views which I have expressed conflict with some of the broader grounds upon which the Master of the Rolls based his judgment in that case, and the fact that I am thus differing from that learned judge has made me consider the matter all the more anxiously.

I ought to notice one argument which was regarded as of weight by two of the learned judges in the Court below. It was said that no disaster similar to that which gave rise to the present action could have occurred on the high seas, and that

(1) [1892] 1 Q. B. 273.

therefore the Court of Admiralty could not have had jurisdiction in such a case, and has not now jurisdiction by virtue of the statute of 1840, when the occurrence takes place within the body of a county. I am unable to entertain this view. I think that a vessel might by the negligence of the owner of a fixed object come into collision with it, and thus sustain damage. Such cases are quite conceivable, although, of course, not likely frequently to occur.

The argument that according to the rule of the Court of Admiralty where both parties are in fault the damage is divided, and that this rule could not well be applied where a vessel is damaged by collision with a dock wall, appears to have weighed a good deal with the Court below. But it appears to me that the difficulty would be precisely the same where the damage was caused by the ship and not received by it, as, for example, in the case of *The Uhla* (1), and other of the cases cited, and yet the suggested difficulty has not prevented the numerous decisions to which I have alluded, in favour of a construction of the Act of 1861, similar to that now contended for in the case of the Act of 1840. The true answer probably is, and it would be of equal weight in both cases, that the rule referred to has never been applied except in the case of a collision between two ships. But, however this may be, the argument cannot I think prevail against the language of the statute when construed in the light of the practice of the Court of Admiralty and the principles upon which its jurisdiction is founded.

For the reasons I have given I have come to the conclusion that the present action might have been maintained in the county court, and that the judgment of the late President of the Admiralty Division must therefore be restored, and I so move your Lordships.

I cannot doubt that this appeal was presented by the appellants, not by reason of the amount of money at stake, but because it was a matter of importance to them that the jurisdiction of the county court in the class of cases referred to should be established. Under the circumstances, although the respondent must of course pay the costs in the Court of Appeal, I think that your

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(1) Law Rep. 2 A. & E. 29, n.; 3 Asp. M. L. C. (O.S.) 148.

Lordships might properly order that there should be no costs in this House.

I have to say that my noble and learned friend Lord Morris, who is unavoidably absent to-day, concurs in the opinion which I have expressed to your Lordships.

LORD MACNAGHTEN :—

My Lords, the action, out of which this appeal arises, was brought against the Mersey Docks and Harbour Board for damage to a vessel alleged to have been occasioned by the negligence of the dock officials. While under their orders, the vessel was injured by striking against the wall of the pier head at the entrance to the Nelson Dock in Liverpool. The action was brought in the Admiralty Division of the High Court. The amount claimed was above the county court limit for ordinary civil actions, but below the limit for Admiralty cases. The trial took place before the late President, Sir Charles Butt. His Lordship found in favour of the plaintiff, but he gave no costs on the ground that the action might have been brought in the county court. In dealing with the costs his Lordship admittedly intended to exercise any and every discretion vested in him, either by the General Orders, or by the 9th section of the County Court Admiralty Jurisdiction Act 1868, if that section was to be treated as still in force.

On appeal as to costs, the Master of the Rolls and Lopes L.J., Fry L.J. dissenting, held that the action could not have been brought in the county court, and that therefore the President was not justified in depriving the plaintiff of his costs. The majority of the Court held (1.) that in regard to damage to ships, county courts having Admiralty jurisdiction had no larger jurisdiction than the Court of Admiralty, and (2.) that the action was not one that the Court of Admiralty itself could have entertained.

The second point was discussed at length in the judgments of the Court of Appeal. The first was taken to be concluded by the judgment of the Court of Appeal in *Reg.* v. *Judge of the City of London Court* (1). In that case the action was brought on the

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(1) [1892] 1 Q. B. 273.

Admiralty side of the City of London Court by the owners of a barge against the pilot of a steam vessel under compulsory pilotage to recover compensation for damage by a collision in inland waters alleged to have been caused by the pilot's negligence. The Court of Appeal held that the Court of Admiralty had no jurisdiction to entertain an action in personam against a pilot in respect of a collision between two ships on the high seas caused by the pilot's negligence, and that consequently no county court could have such jurisdiction under the County Courts Admiralty Jurisdiction Acts 1868, 1869. To the decision itself, as it seems to me, no exception can be taken. But I do not think it can be treated as governing the present case. To say nothing of the authorities, which are tolerably clear against the right to sue a pilot for negligence in the Court of Admiralty, the considerations applicable to the two cases are I think materially different. The main subject of discussion before your Lordships was the question whether the Court of Admiralty at the time when the Act of 1868 was passed had jurisdiction in such a case as that which gave rise to the plaintiff's action.

My Lords, I do not propose to trouble you by tracing the history of Admiralty jurisdiction from the reign of Richard II., or even by commenting upon any of the numerous cases which the industry of counsel produced. The arguments on the one side and the other are stated in the judgments of the Master of the Rolls and Fry L.J.; and the authorities have been very fully discussed by my noble and learned friend on the woolsack. Speaking for myself, I think the question is one of no little difficulty, and I doubt whether it is possible to come to an absolutely clear opinion one way or the other. But on the whole I am disposed to agree with Fry L.J. In language which was probably intended to remove all difficulties—and difficulties, as Dr. Lushington said in the case of *The Malvina* (1), continually occurred from the words of the statute of Richard II.—the Act of 1840 defined the jurisdiction of the Court of Admiralty on the high seas as well as within the body of a county. It enacted that the Court should have jurisdiction, among other things, to decide all claims and demands whatsoever for damage received

(1) Lush. 493; in P. C., Brown. & Lush. 57.

by any ship or sea-going vessel, whether such ship or vessel might have been within the body of a county or upon the high seas at the time when the damage was received. And then the Admiralty Court Act 1861 declared that the Court should have jurisdiction over any claim for damage done by any ship. There was, therefore, at the time when Admiralty jurisdiction was given to county courts, legislation in force which seems to have been intended, as Fry L.J. observes, "to give reciprocal rights in cases of damage done by a ship and to a ship," and in both those cases, as his Lordship pointed out, and as the Lord Chancellor has now more fully shewn, it had been determined that it was not necessary that the body receiving or doing damage should be a ship.

Then came the County Courts Admiralty Jurisdiction Act 1868; and that Act was followed in the next year by the Amendment Act of 1869, which is to be read and interpreted as one Act with the Act of 1868. It cannot I think be disputed that if at the time of the passing of the County Courts Acts of 1868 and 1869 the Court of Admiralty had jurisdiction to entertain such an action as the present the jurisdiction within the prescribed limit of value was transferred to county courts having Admiralty jurisdiction.

My Lords, if the jurisdiction of the Court of Admiralty in such a case as that under consideration were more doubtful than I think it is there would still perhaps be something to say in favour of the view that county courts have by statute that jurisdiction within the prescribed limit of value.

Section 4 of the Act of 1869 says that the 3rd section of the Act of 1868 shall extend and apply to all claims for damage to ships whether by collision or otherwise. Why should not those words have their proper and natural meaning? In the present case there is damage to a ship. The ship has been damaged otherwise than by collision, taking "collision" to mean collision between two vessels. Why should the language of sect. 4 be cut down to the limits of Admiralty jurisdiction recognised as in actual operation at the date of the Act, even if those limits could be ascertained precisely? Even if it were a doubtful question whether such a jurisdiction was possessed by the Court of Admiralty, if it were a matter of difficulty, as everybody I think must now admit it to be, after the judgment of the Court of Appeal in the present case, why should we reject the plain and ordinary meaning of words which we find in the statute, and which may have been intended to put an end to difficulties and doubts on the subject, especially when it is considered that in all matters in which ships and sailors are concerned it is of extreme importance that any litigation should be disposed of promptly and on the spot?

I agree with Fry L.J., that no difficulty is caused by the Admiralty rule as to common negligence. That rule, apparently, has never been applied except in cases of collision between ships.

In the result, I am compelled to hold that this action might have been brought in the county court, and that the Court of Appeal had no jurisdiction to interfere with the order made by the President as to the costs of the action before him.

Order appealed from reversed and judgment of the President of the Admiralty Division restored: the respondent to pay the appellants' costs in the Court of Appeal; each party to pay their own costs in this House: Cause remitted to the Admiralty Division.

Lords' Journals 4th August 1893.

Solicitors for appellants: *Rowcliffes, Rawle & Co., for A. J. Squarey, Liverpool.*

Solicitors for respondent: *Botterell & Roche.*

[PRIVY COUNCIL.]

J. C.*
1893
May 12, 16; June 24.

THE OWNERS OF SS. "UTOPIA" . . . APPELLANTS;

AND

THE OWNERS AND MASTER OF SS. "PRIMULA" . . . . RESPONDENTS.

THE "UTOPIA."

CONSOLIDATED ACTIONS.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR.

Collision with sunken Wreck in Harbour—Transfer of Control to Port Authority—Liability—Maritime Lien.

Where the owners of a wreck remained in possession thereof, but the port authority undertook and neglected the duty of indicating its position so as to secure ships entering the harbour where she lay from the danger of collision with her:—

Held, that neither the owners nor the wreck were liable for a collision which ensued. The control and management thereof had been legitimately transferred by the owners to the port authority, acting within the apparent scope of its powers, and in the absence of negligence by the owners no maritime lien arose.

The Parlement Belge (5 P. D. 219) approved.

The colliding ship having been navigated in circumstances of instant peril with reasonable care and skill, *held* that it was not answerable for the collision.

The Bywell Castle (4 P. D. 219) approved.

APPEAL from a decree of the Vice-Admiralty Court (April 12, 1892), ordering that both ships were to blame, and that the damages arising therefrom ought to be borne equally by their respective owners.

The facts are stated in the judgment of their Lordships.

Finlay, Q.C., *Aspinall*, Q.C., and *Aspinall*, for the appellants, contended that the *Primula* was alone to blame. At the time of the collision the appellants were not in possession, or at any rate had not the control or management of their wreck, and of the lighting and marking thereof. They had transferred the same to the port authority, which under its powers in that behalf took the control and management of the wreck, and of the marking and lighting thereof, from the appellants. The port authority thereupon became responsible, and the appellants ceased to be responsible, or to be under any obligation to light and mark the wreck. There was no negligence on the part of the appellants in transferring the control. The port authority had the power to assume such control, and they exercised it. Further, on the evidence the wreck was marked and lighted in conformity with the existing regulations and practice. The collision in truth was solely caused by the negligence of those in charge of the *Primula* in not keeping her clear of the wreck. Reference was made to *The Douglas* (1); *Brown* v. *Mallett* (2); *White* v. *Crisp* (3); *The Castlegate* (4); *The Tasmania* (5).

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* *Present*:—LORD WATSON, SIR RICHARD COUCH, SIR FRANCIS JEUNE, and the HON. GEORGE DENMAN.

An Order in Council of the 2nd of February, 1884, applied to Gibraltar the law of England as it existed at the end of 1883, and another order in 1886 gave the powers therein mentioned to the harbour authorities. Under the order of 1884 the Wrecks Removal Act of 1877 applied to Gibraltar. Apart from that order, sect. 4 of the Act of 1877 applied.

Cohen, Q.C., and *Raikes*, for the respondents, contended that the sunken *Utopia* remained the property of the appellants. It continued to be under their control and management notwithstanding the action of the port authority. It was allowed by the appellants to remain sunk in Gibraltar Bay in a position dangerous to navigation without any sufficient lights upon her to shew her position, and without any sufficient steps being taken to indicate her position or warn approaching vessels of it. For instance, the lights exhibited on the hulk were inefficient and misleading. The hulk itself was too far from the wreck, and the appellants neglected to take any steps to have the hulk moored in a proper position and properly lighted. It was contended that the appellants were responsible; otherwise that the

(1) 7 P. D. 151.
(2) 5 C. B. 599.
(3) 10 Ex. 312.
(4) [1893] A. C. 38, 52.
(5) 13 P. D. 110.

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action was in rem, and a maritime lien on the ship arose in favour of the respondents. As regards the *Primula*, she was properly navigated, with a good look-out. The masts and funnel of the *Utopia* were seen as soon as it was possible, and the manœuvres thereupon executed were seamanlike and the best that could be attempted under the circumstances. Otherwise, it was contended that they resulted from the wrongful act and negligence of the appellants in not properly lighting the wreck and hulk. The *Primula* was not in any respect to blame, and responsibility for the collision and consequent damage rested solely with the *Utopia*. Reference was made to *The Bywell Castle* (1); *The Ticonderoga* (2); *The Tasmania* (3); *Fletcher* v. *Braddick* (4); *Hodgkinson* v. *Fernie* (5).

Finlay, Q.C., replied.

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The judgment of their Lordships was delivered by

SIR FRANCIS JEUNE:—

These are appeals from the decision of the Chief Justice of the Vice-Admiralty Court of Gibraltar, in two consolidated actions, the first being brought by the owners of the steamship *Utopia*, against the owners of the steamship *Primula* and freight, the second being brought by the master of the *Primula* against the *Utopia*.

The case arose out of a collision occurring between the *Utopia*, which was lying sunk in Gibraltar Bay, and the *Primula* entering that bay at about 8 P.M. on the 31st of March, 1891. The *Utopia* had been sunk by collision with Her Majesty's ship *Anson*, on the 17th of March, at a spot about a quarter of a mile N. by E. of the extremity of the New Mole, and, thereafter, lay with her hull submerged, but her two masts, her yards, and her funnel above water, the masts being immersed only to the extent of about fifteen feet, and the funnel proper not at all. From the 17th to the 23rd of March the wreck was lighted by her owners, a light being hoisted at each mast-head. The acting captain of

(1) 4 P. D. 219.
(2) Swabey, 215.
(3) 13 P. D. 110.
(4) 2 B. & P. 182.
(5) 2 C. B. (N.S.) 415.

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the Port of Gibraltar then complained to the manager for the owners of the *Utopia*, that the lights were not sufficient, and were not properly looked after, and gave an order to William Adair, a boarding officer, to have a hulk moored in the vicinity of the wreck in order to warn vessels in accordance with the Board of Trade instructions. These instructions are No. 28 of the Board of Trade Regulations, and are as follows: "In England and Ireland wherever a light vessel or other craft is anchored to mark the position of a wreck, the top sides will be coloured green, and she will be further distinguished by day by three balls placed on a yard twenty feet above the sea, two balls (vertically) on the side on which navigating vessels may safely pass, and one on the other, and by night by three fixed white lights similarly arranged and with the same meaning. These marking vessels when so employed and fitted will not shew the ordinary riding light." Mr. Adair, in pursuance of this order, agreed with the owner of a hulk that she should be placed near the wreck in the position and exhibiting the lights described in these instructions. On the 23rd of March the hulk was accordingly anchored on the port side of the wreck, with four shackles to south-west, and four to north-east, by the bows on a swivel. In this position the hulk swung with the tide, and when swung stern on was about thirty fathoms from the wreck. It was the duty of those employed to see that when the vessel swung the yard was braced round so as to preserve the position of the lights relatively to the wreck. The expense of this hulk was defrayed by the port authorities.

It is not necessary to refer at any length to the mode of lighting the wreck, or to the way in which the instructions to the owners of the hulk were carried out by the men employed by them for the purpose. Evidence was given on behalf of the *Primula* that only two lights were visible on board of the hulk before the collision, for which some time afterwards three lights were seen to be substituted, and that in consequence those on board of the *Primula* were ignorant that they were approaching the *Utopia*, till they saw her masts and funnel, and so came into collision with her.

On the other side was called Manuel Cruz, one of the men on board the hulk, who said that the lamps were of the proper number and in the proper position. It is clear, however, that the evidence of this witness was not accepted by the learned judge in the Court below, for he has found that it was probably the case that on the night of the collision the duties of the light-keepers on board of the hulk were very inefficiently performed. Their Lordships see no reason to doubt the correctness of this opinion, and they think it must be taken to be the case that, owing to the neglect on the part of those employed by the acting captain of the port, that is to say, the port authority, the position of the wreck was insufficiently indicated, and that in consequence those in charge of the *Primula* were misled and had no notice from lights of the position or existence of the wreck.

The first question which is raised in this appeal is whether the owners of the *Utopia* are liable to the owners of the *Primula* for the damage sustained by the *Primula* in the collision by reason of this insufficient lighting of the *Utopia.*

The learned judge in the Court below has held that the owners of the *Utopia* are liable, because they remained in possession of the wreck, and on them alone rested the responsibility of taking every means in their power to secure ships entering the harbour from the danger of collision with her.

Their Lordships think that the law applicable to this case may be gathered from three authorities which their Lordships do not regard as being in conflict.

The first of these cases is that of *Brown* v. *Mallett* (1), which was decided on demurrer, and in which, the question being whether, in the absence of an allegation that the possession and control of a vessel after she had foundered was in the defendants, an obligation to protect other vessels against injury was imposed on them, that question was answered in the negative. It is to be observed that what was laid down was, and was only, that "this duty of using reasonable skill and care for the safety of other vessels is incident to the possession and control of the vessel." The case does not define exactly what is meant by possession and control, nor does it throw light on what constitutes reasonable skill and care in circumstances such as those of

(1) 5 C. B. 599.

this case. In the case of *White* v. *Crisp* (1), also decided on demurrer, the pleader alleged a transfer of the vessel, and that the transferees had and exercised, at the time of the happening of the injury, possession, control, management, and direction of the vessel. It was held that they were liable. But the Court in giving judgment defined their understanding of the allegation that the defendants had and exercised possession, control, management, and direction of the vessel, to be that "the defendants had it in their power, by due care and exertion, to have altogether removed this vessel, or to have shifted at least its position, and so might reasonably have been able to have prevented the injury," and added that, "if these words do not mean this, we think there was no liability on the part of the defendants." It is clear, therefore, from this case, that to the extent to which the owners have properly parted with the control and management of their vessel, their liability ceases.

The case of the *Douglas*, decided in the Court of Appeal (2), is very similar to the present. There the steamship *Douglas* was, by the fault of those on board of her, sunk in the Thames. The vessel was never abandoned, but the master and the mate took steps to inform the harbour-master, and the mate was told that the harbour-master undertook to light the wreck. The steamship *Mary Nixon* collided with the *Douglas* six hours after she sank, and it appears to have been assumed and indeed would seem clear (though it was suggested before their Lordships that there was no negligence in anyone), that the harbour-master might have taken but did not take steps to light the wreck. It was held by Sir Robert Phillimore, on the authority of *White* v. *Crisp* (1) and *Brown* v. *Mallett* (3), that "the possession, management, and control of the *Douglas* was not abandoned by her master and crew," and that the owners were therefore liable. On appeal, this decision was reversed, on the ground that, inasmuch as notice was given to the harbour-master, the defendants were not guilty of negligence. It may be observed also that, in the opinion of Lord Justice Cotton, the defendants had in fact for the time abandoned the control of the wreck.

(1) 10 Ex. 312.
(2) 7 P. D. 151.
(3) 5 C. B. 599.

The result of these authorities may be thus expressed. The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shewn, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned, or legitimately transferred, and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect.

In the present case, the *Utopia* was certainly not abandoned by her owners in the sense that they gave up all rights of property and possession in her. On the contrary, they no doubt always intended to raise her if they could, and in fact, either before or soon after the collision with the *Primula*, they commenced the construction of a coffer-dam, and by its means eventually recovered the vessel.

It is clear, however, that before the collision with the *Primula* the port authority of Gibraltar, represented by the acting captain of the port, took from the owners, and itself assumed, the task of protecting other vessels from the wreck by means of the signals which it directed to be employed for the purpose. The owners of the *Utopia* yielded to the action of the port authority, and thenceforward stood aloof from the operation of lighting the wreck. In these circumstances, it appears to their Lordships that the control and management of the wreck, so far as related to the protection of other vessels from her, and of her from them, was properly transferred to the port authority. Further, their Lordships are unable to see how any part of the conduct of the owners of the *Utopia* can lay them open to a charge of negligence. Neither in allowing the port authority to take on itself the control of the lighting, nor in abstaining from interfering with the subsequent action of the port authority in the matter, do their Lordships think that any default can be imputed to them. It would be dangerous if an owner of a wreck were compelled, in order to avoid a personal responsibility, to interfere with the action taken by a public authority constituted for such purposes to ensure the safety of other vessels navigating those waters.

Their Lordships do not desire to indicate any doubt whether the port authority of Gibraltar had legally power to deal with the protection of sunken vessels; but they do not think it necessary to inquire into the precise legal foundation of such power. The action taken by the port authority was certainly within the apparent scope of its powers, and it would be impossible to hold that the captain, or owners, of a vessel entering a port were bound, under pain of being held liable for the acts of the port authority, to inquire into the sources of its legal power before rendering obedience or deference to it.

It was suggested in argument that, as the action against the *Utopia* is an action in rem, the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law now well recognised. No doubt at the time of action brought, a ship may be made liable in an action in rem, though its then owners are not, because, by reason of the negligence of the owners, or their servants, causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of collision may have possessed. In the recent case of the *Castlegate*, in the House of Lords (1), language used by the present Master of the Rolls in the case of *The Parlement Belge* (2), which expresses the above view, was quoted with an approval which their Lordships desire to repeat.

The second question in this case relates to the conduct of the *Primula*. The learned judge in the Court below, guided in part by the expert evidence called before him, has held that the captain of the *Primula*, by putting his engines full speed ahead and his helm hard-a-starboard, contributed to the collision. The account given by the master of the *Primula* of the circumstances and of his action is as follows: "Passing New Mole Head saw vessel with two lights on our port bow nearly ahead. Took them for ship's anchor lights. Took it to be one on each masthead. Came on, sometimes stopped and sometimes moving engines to steer. Nothing reported to me passing New Mole Head. Look-out man hailed there was something on starboard bow about five minutes before collision. Engines not moving then. Ship drifting. I observed funnel, mast and yard above water on starboard bow, about fifty yards away. No lights on them two points on starboard bow (funnel). Put engine full speed ahead for five or six turns, and put helm hard-a-starboard. If I had ported I should have gone amidships. Should not have cleared her. After the turns I stopped engines. If I had gone astern I should have struck steamer amidships just the same. Could not go astern, as there was another steamer astern of me also coming in. I think stem of *Utopia* was visible above water, but that night could see nothing but masts and funnel. There was nothing whatever to indicate her position." The accuracy of this statement appears to have been doubted by the learned Chief Justice on one point only, that relating to the ship alleged to be following the *Primula*. Having regard to the facts that the express statement of the master of the *Primula* on this point is corroborated by his crew, is contradicted only by the occupant of the hulk whose statement as to the lights cannot be accepted, and was not challenged in cross-examination, at a time when it would have been possible to have sought for further corroborative evidence, their Lordships are not prepared to reject the clear assertion of the master of the *Primula* that there was a vessel close astern of him which impeded his going astern. It may be added that the learned judge has found, in their Lordships' opinion correctly, that the tide was half ebb and the wind northerly.

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(1) [1893] A. C. 52.

(2) 5 P. D. 219.

The question is one of seamanship, and it is, in their Lordships' opinion, a question of seamanship in circumstances of instant

J. C.
1893

OWNERS OF SS. "UTOPIA" v. OWNERS AND MASTER OF SS. "PRIMULA."

THE "UTOPIA."

peril. They think that the master of the *Primula* is entitled to pray in aid this latter circumstance in the consideration of his conduct, on the principles approved by the Court of Appeal in the case of *The Bywell Castle* (1).

Their Lordships do not think it necessary to examine the expert evidence in the Court below, inasmuch as they have the assistance of skilled assessors. Taking the facts and circumstances to be as above stated, they have requested their assessors to advise them whether the captain of the *Primula*, in pursuing the course he adopted, acted with that care and skill which might reasonably be expected of a competent navigator, and they are advised, without hesitation, that he did so act. This advice their Lordships think it right to adopt.

Their Lordships therefore think that the appeal of both parties should be allowed, that the decree of the Court below should be reversed and both actions dismissed, and that each party should bear their own costs of this appeal and in the Court below. They will humbly advise Her Majesty accordingly.

Solicitors for appellants: *Clarkson, Greenwells & Co.*
Solicitors for respondents: *Clarkson, Damant, & Toovey.*

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(1) 4 P. D. 219.

[PRIVY COUNCIL.]

J. C.*
1893
June 30.

TRENT-STOUGHTON . . . . PLAINTIFF;

AND

THE BARBADOS WATER SUPPLY COMPANY, LIMITED . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF COMMON PLEAS OF THE ISLAND OF BARBADOS.

Law of Barbados—Water Supply Act, 1886, *ss.* 11, 23—*Compensation—Past and Future Profits.*

Where certain streams of water had been abstracted from the appellant's property by a water company acting under the Water Supply Act, 1886:—

Held, that the compensation due to the appellant included the value of his proprietary interest therein, and was not limited to the amount of pecuniary benefits obtained by past user thereof in disregard of possible benefits in the future.

APPEAL from an order of the above Court (May 22, 1891), refusing to set aside a verdict which had been obtained by the appellant. The appellant had originally claimed £1000 as compensation for his interest in the waters (the subject of suit) and damages sustained by reason of their having been abstracted. A special jury awarded £1000. This verdict was set aside as excessive and a new trial had, when a verdict was given for £500. This verdict the Court refused to set aside, the grounds of application to that effect being erroneous rejection of evidence and misdirection in law. Those grounds appear in the judgment of their Lordships.

Cohen, Q.C., and *Swinfen Eady,* for the appellant contended that he was entitled to be compensated for all loss and damage incurred by him in consequence of the respondent having abstracted the waters in which he was interested. The amount of damage was not limited merely to the loss of such user as he had actually availed himself of and enjoyed but extended to the whole value of the property of which he had been deprived. [They were stopped by their Lordships.]

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HALSBURY, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

Finlay, Q.C., and *Waggett*, for the respondent, contended that having regard to the terms of the Water Supply Act, 1886, ss. 10, 11 and 23 being specially referred to, and the terms of the notice given thereunder, the appellant was not entitled to compensation under the Act, at all events in this proceeding, for loss of his proprietary interest. Evidence regarding the value of such proprietary right was properly rejected. The loss actually sustained of benefits previously enjoyed was the measure of such damages as the appellant was entitled to in the proceeding instituted by him.

Counsel for the appellant were not heard in reply.

The judgment of their Lordships was delivered by

LORD HALSBURY:—

This is an appeal from a judgment of the Court of Common Pleas of the Island of Barbados, of the 22nd of May, 1891, by which the Court refused to set aside, at the instance of the appellant, a verdict for a sum of £500 awarded to him by a jury as compensation for the abstraction from his property by the respondent of certain streams of water under the provisions of the Water Supply Act, 1886, and declined to grant him a new trial.

The short point that arises is, whether the direction given by the Chief Justice upon the question of compensation was right, and whether, also, he was right in rejecting certain evidence as to the value of the subject matter in dispute.

Two sections of the Act in question contemplate the acquisition by the water company of property necessary for the execution of their works—the 11th section, which gives power to take without agreement, and the 23rd section, which gives power to purchase by agreement with the owners of any lands or streams or any estate or interest therein, for a consideration in money, any such lands or streams, and all estates and interests in such lands or streams of what kind soever.

Their Lordships are not able to follow the distinction which was sought to be established between these sections. In both of them it is assumed that compensation is to be given to the person whose property is affected by the exercise of the powers of the Act. If the property is taken it is to be paid for, and whether it is by the process of agreement or compulsorily taken under the powers of the Act is immaterial, except that in one case the parties agree, and in the other the sum is fixed by the tribunal pointed out by the statute.

The Chief Justice directed the jury that the question was, not what was the value of the interest of the appellant in the streams, but whether he had sustained damage or loss by being deprived of their use, and that "the question was not as to the money value of the plaintiff's interest in the streams, . . . but was whether the plaintiff had been using these streams in some way to his advantage, so that his being deprived of their use, from their being taken and abstracted by the defendant company, worked damage and loss to him." Their Lordships are of opinion that the question was, what was the value of the interest of the appellant in the streams, it being conceded that in the exercise by the respondent of the powers conferred upon it by the Act, those streams had been abstracted, and that the appellant had been deprived of the power of exercising the rights which he had up to that time possessed in respect of them. That is "damage or loss" within the meaning of the Act. Though he never had up to that time obtained one farthing for the use of the streams, and might never have made any use of them, nevertheless, the damage or loss which he sustained was, that he was deprived of the power of using the property which was his.

The second question is in truth involved in the first. The Chief Justice rejected evidence of an offer by the Bridgetown Waterworks Company to purchase the appellant's rights in the streams for a certain sum of money, his view apparently being that unless the appellant had actually made some pecuniary benefit already out of the streams, the possibility of his making use of them in the future was irrelevant to the inquiry as to

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TRENT-STOUGHTON v. BARBADOS WATER SUPPLY COMPANY.

what was the value of his interest in them. Their Lordships are wholly unable to take that view.

Inasmuch as this matter has been twice before the Courts, and on the first occasion £1000 was given to the appellant, and on the second occasion £500 was given under a direction which their Lordships hold to be erroneous, it may be worth the consideration of the parties whether, to avoid further litigation, they should content themselves with the sum which was given on the first occasion, so as to prevent the necessity of a third trial. Their Lordships have no power to direct this course. They can only throw out the suggestion.

In the result, therefore, their Lordships will humbly report to Her Majesty that the judgment appealed from ought to be reversed, that the rule for a new trial ought to be made absolute, and that the respondent must pay to the appellant his costs below from the date of the order of the 6th of January, 1891, including the costs of the second trial, and his costs of this appeal.

Solicitors for appellant: *Druces & Attlee.*
Solicitors for respondent: *Reyroux, Phillips, & Golding.*

[PRIVY COUNCIL.]

J. C.*
1893
June 29;
July 22.

THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY, LIMITED, AND ANOTHER . . . . DEFENDANTS;

AND

DUGGAN . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Transfer of Shares subject to a Trust—Constructive Notice—Signature of Bank Manager as "Manager in Trust."

Where the respondent had transferred shares as security for a loan, *held*, that the appellants, as derivative transferees from the lender, were not affected by a trust in favour of the respondent, unless such trust was clearly disclosed on the face of their author's title, or was otherwise notified to them.

The words "manager in trust," appended to the signature of a bank manager, import that he held and transferred the shares in trust for his employers, the Bank, and are not calculated to suggest that he stood in a fiduciary relation to some third person, so as to affect a transferee for value with constructive notice of such relationship.

APPEAL by special leave from a decree of the Supreme Court (May 2, 1892), reversing a decree of the Court of Appeal for Ontario and restoring a decree of Street, J.

The question at issue was as to the right of the appellant company to apply the proceeds of certain shares claimed by the respondent, in payment of advances made by the appellant to the defendant Cochran, on the security of those shares; Cochran as between himself and the respondent, having only a pledgee's interest therein. Its decision turned on the question whether the appellant company had notice, actual or constructive, of any trust in favour of the respondent.

Blake, Q.C. (of the Canadian bar), and *Graham Murray*, Q.C. (of the Scotch bar), for the appellant.

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HALSBURY, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

McCarthy, Q.C. (of the Canadian bar), and *Gore*, for the respondent.

1893. July 29. The judgment of their Lordships was delivered by

LORD WATSON:—

The controversy between the parties to this appeal, which has occasioned much difference of opinion in the Courts below, relates to 798 shares of the Land Security Company of Toronto, of which 160 were old shares fully paid up, and 638 were new shares upon which 20 per cent. had been paid.

The capital of the Land Security Company, which was incorporated under Statutes of the Province of Ontario, has not been turned into stock, and is not divided into shares of a certain fixed amount. Its shares are neither numbered, nor otherwise identified; so that each share simply represents an aliquot part of the concern carried on by the company, which cannot be precisely ascertained except by reference to its stock ledger.

The statutes enact that no transfer of the company's shares shall be valid until entered in its books, according to the forms prescribed, from time to time, by the directors. They make no provision for the issue of share-certificates, or any document of title, to members of the company; and no such document has ever been issued. The only legal evidence of the ownership of shares which have been transmitted from the original allottee, is to be found in the transfer book of the company.

It is not matter of dispute that the 160 old shares at one time belonged to the respondent, Edmund Henry Duggan, who, in 1882, transferred them to Scarth and Cochran, a firm of brokers in Toronto, in security of advances. After receiving the transfer, that firm proceeded to use the shares in raising loans for their own accommodation, and as in right of these shares, and in the interest of the respondent, they obtained an allotment of the 638 new shares which are now in question. On obtaining the allotment, they dealt with these new shares also for the purpose of obtaining money-advances on their own account. In the course of these transactions, which extended over a period of several years, Scarth and Cochran repeatedly paid up the advances made to them by procuring a fresh loan; and, on these occasions, the shares were transferred to the new lender by the previous holder of them. In the beginning of 1887, their lender was the Federal Bank, to whom they had agreed to convey in security the whole of these 798 shares; and that agreement had been duly carried out by the previous holders executing transfers, in the transfer book of the company, in favour of "J. O. Buchanan, Manager in trust," which were accepted by him, under the same designation.

In 1887, Scarth and Cochran arranged with the appellants, the London and Canadian Loan and Agency Company, Limited, for an advance of $14,300, to enable them to discharge their debt to the Federal Bank, upon condition of the shares held by the bank, in name of their manager, being transferred as security to the appellants. In pursuance of that arrangement, two transfers, one of the 160 old, and the other of the 638 new shares, were, on the 7th of September, 1887, duly executed in the transfer book of the Land Security Company, bearing to be granted by "J. O. Buchanan, Manager in trust" to the appellant, "James Turnbull in trust." The said appellant was at that time the manager of the appellant company. Each of these transfers was executed by "J. O. Buchanna, Manager in trust," as transferor, per Robert Cochran his Attorney, and was accepted by the appellant James Turnbull, who added the words "in trust" to his signature. The power of attorney by J. O. Buchanan in favour of Cochran was also entered in the transfer book.

The appellant company sold the shares; and after payment of their advance to Scarth and Cochran, there remained a balance, for which they have all along been willing to account. In this action, which was brought by the respondent Duggan, before the Chancery Division of the High Court of Justice of the Province of Ontario, he claims payment from the appellants, not of the price received for the shares, but of their full market value, under deduction only of such debt, if any, as he owed to Scarth and Cochran. Alternatively, he claims the balance of the price, after satisfying Scarth and Cochran's debt to the appellant company.

The legal principles involved in this appeal may be of interest to the mercantile community; but, in the circumstances of the case, their Lordships have not found their application to be attended with difficulty.

It is conceded on all hands that, in any question between him and Scarth and Cochran, the respondent would have been entitled to get back his shares, or their proceeds, upon payment of the debt which he owed to the firm. Whether the successive transferees, who held the shares intermediately between Scarth and Cochran and the Federal Bank, were affected by the relations which admittedly subsisted between that firm and the respondent, is a matter upon which their Lordships do not find it necessary to express any opinion. No such trust, in favour of the respondent, as has been held to exist in this case, could affect holders of the shares after Scarth and Cochran, unless it was disclosed on the face of their author's title, or was otherwise notified to them. The evidence shews, and all the learned judges in the Courts below assumed, that the appellants had no intimation of the existence of a trust running with the shares, other than was conveyed to them by the terms of their transferor's title as it stood in the books of the company. They had a right to satisfy themselves by inspection of the books, that J. O. Buchanan, as representing the bank of which he was manager, was in titulo to transfer to them; and, whether they enquired so far or not, they must be held to have done so. But they had no right, and were under no duty, to trace back the history of the shares, in the course of their transmission from the respondent.

The fate of this appeal must therefore depend upon the single issue,—whether the words "manager in trust" appended to the designation and signature of J. O. Buchanan in the transfer book, indicate that he was trustee for some beneficiary other than the Federal Bank, or merely import that he held the shares for behoof of the bank. Apart from the evidence, their Lordships have no hesitation in holding that the added words, according to their natural construction, mean that Buchanan, as an official of the bank, held in trust for his employers, and are not calculated to suggest that he stood in a fiduciary relation to any other person.

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LONDON AND CANADIAN LOAN AND AGENCY COMPANY v. DUGGAN.

It was argued that these words, even though they might not clearly indicate a trust for others than the bank, were at least so ambiguous as to cast upon the appellants the duty of making inquiry. Their Lordships are not of opinion that any such ambiguity exists. But the argument, had there been some foundation for it, would have come to nothing; because it is clearly proved that the Federal Bank intended Buchanan to hold for them, and for them only; and it is also proved, and is assumed by the learned judges who found for the respondent, that the appellants, if they had enquired, would have received a positive assurance to that effect.

Their Lordships will therefore humbly advise Her Majesty to reverse the decision of the Supreme Court of Canada, to restore the judgment of the Court of Appeal; and to order the respondent to pay to the appellants the costs incurred by them before the Supreme Court, and to declare that the appellants are to be at liberty to retain the sum of $3080 : 5 mentioned in the certificate of the Court of Appeal in payment pro tanto of their taxed costs in the Supreme Court as well as of the costs to which they have been found entitled by the judgment of the Court of Appeal. The respondent must also pay to the appellants their costs of this appeal.

Solicitors for the appellants: *Gadsden & Treherne.*
Solicitors for the respondent: *Bompas, Bischoff & Co.*

[PRIVY COUNCIL.]

J. C.*
1893
July 12, 29.

TORONTO STREET RAILWAY COMPANY APPELLANT;

AND

CORPORATION OF THE CITY OF TORONTO . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canadian Act 24 *Vict. c.* 83—*Ontario Act* 53 *Vict. c.* 105—*Construction.*

Where by Act of the legislature the appellant company was authorized to construct a railway upon and for that purpose to use the streets of a city and its adjoining municipalities, which by the same Act were authorized to grant an exclusive privilege for that purpose upon such conditions and for such period as might be agreed upon; and thereafter, by certain resolutions, agreement, and by-law such privilege was limited to thirty years, at the expiration of which the corporation of the city might assume the ownership:—

Held, that the Act could not be construed as granting a perpetual privilege to use the streets for the purpose of the railway, but that the privilege thereby granted was limited to thirty years by the agreement and by-law. That limit of time applied, not merely to the original railway, but to the various extensions thereof authorized in pursuance of the same privilege.

APPEAL from a judgment of the Court of Appeal (Jan. 17, 1893) affirming a judgment of Robertson, J. (April 5, 1892), which dismissed a motion to set aside an award made under an agreement of reference confirmed by Ontario Act 53 Vict. c. 105.

The appellant company was incorporated by Dominion Act 24 Vict. c. 83. Its provisions, and the agreements made thereunder, are sufficiently set out in their Lordships' judgment.

The appellants contended in the above motion that (1.) their franchise was a privilege to occupy for the purposes of a railway the streets mentioned in the agreement in perpetuity, subject only to the right of the city to assume ownership on payment of the value, and was not a privilege limited to thirty years; (2.)

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* *Present:*—THE EARL OF SELBORNE, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

that the privilege granted in respect of streets other than those mentioned in the original grant and agreements was granted in perpetuity, the right of the city to acquire the same being under 53 Vict. c. 105.

Sir *Horace Davey*, Q.C., *M'Carthy*, Q.C., *G. F. Shapley*, Q.C. (both of the Ontario bar), and *Swinfen Eady*, for the appellant, contended that on the true construction of the Act the grant to the first railway company, of which the appellant was assignee, was of a franchise in perpetuity, subject to a condition of expropriation. And as to the other franchises granted, they were in perpetuity, or, if for thirty years, the time would run from the dates on which they were respectively granted, and not from the date of the original grant. Reference was made to *In re Kirkleatham Local Board and Stockton, &c., Water Board* (1); *Gardner* v. *London, Chatham, and Dover Railway Company* (2); *Morgan* v. *State of Louisiana* (3); *Gue* v. *Tidewater Canal Company* (4); *Davis* v. *Memphis and Charleston Railway Company* (5); *Toronto* v. *Toronto Street Railway Company* (6).

Blake, Q.C., *Robinson*, Q.C., *S. H. Blake*, Q.C. (all of the Ontario bar), and *Gore*, for the respondent, were not heard.

1893 July 29.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

This is an appeal from a judgment or order of the Court of Appeal for Ontario, dated the 17th of January, 1893, dismissing the appeal of the present appellants from an order of the Chancery Division of the High Court of Justice for that province, dated the 5th of April, 1892, which dismissed the appellants' motion to set aside or refer back an award to certain arbitrators.

By an Act for incorporating the Toronto Street Railway Company, passed on the 18th of May, 1861, one Alexander Easton and such other persons as should become shareholders of the company were incorporated by the name of "The Toronto Street Railway Company," and were authorized to construct a railway upon and along any of the streets or highways in the city of Toronto and the municipalities immediately adjoining the limits of the city, and were given power to use and occupy such parts of the streets or highways as might be required for the purpose of their railway track, provided that the consent of the city and municipalities should be first obtained. And the city and municipalities were authorized to grant permission to the company to construct the railway, and use and occupy the streets and highways for that purpose, upon such conditions and for such period or periods as might be agreed upon between them.

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(1) [1893] 1 Q. B. 375.

(2) Law Rep. 2 Ch. 212.

(3) 93 U. S. (Sup. Ct.) 223.

(4) 65 U. S. (Sup. Ct.) 24 Howard, 257.

(5) 39 Amer. & Eng. Ry. Ca. 65.

(6) 15 Ont. Ap. 30, 49.

By an agreement made before the passing of the Act, on the 26th of March, 1861, between the corporation and Easton, reciting certain resolutions of the common council of the city of Toronto passed on the 14th of the same month, the corporation granted to Easton the exclusive right and privilege to construct, maintain, and operate street railways in, along, and upon King Street, Queen Street, and Yonge Street in the said city for the term of thirty years mentioned in the 18th resolution, upon the conditions contained in the recited resolutions.

The 18th resolution is as follows:—

"The privilege granted by the present agreement shall extend over a period of thirty years from this date, but at the expiration thereof the corporation may, after giving six months' notice prior to the expiration of the said term of their intention, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of their value, to be determined by arbitration; and in case the corporation should fail in exercising the right of assuming the ownership of the said railway at the expiration of thirty years as aforesaid, the corporation may, at the expiration of every five years to elapse after the first thirty years, exercise the same right of assuming the ownership of the said railway, and of all real and personal estate thereunto appertaining, after one year's notice, to be given within the twelve months immediately preceding the expiration of every fifth year as aforesaid, and on payment of their value, to be determined by arbitration."

The agreement provided that it should only take effect after the legislation necessary for legalizing it should have been obtained, which was done by the 16th section of the Act before mentioned, which empowered the corporation to pass any by-law or by-laws for the purpose of carrying the agreement into effect. A by-law for that purpose was passed on the 22nd of July, 1861.

The company having become insolvent, an Act was passed on the 23rd of January, 1869, enabling the mortgagee of the railway to sell it, and enacting that the purchaser should have all the rights, privileges, and franchises granted to or possessed or enjoyed by the company by or under their Act of incorporation. The railway was sold by the mortgagee, and the appellants, who were incorporated by an Act passed on the 29th of March, 1873, became the owners of it, and stand in the place of the original company, and have the same rights and privileges.

On the 23rd of November, 1889, the corporation of Toronto gave notice to the appellants, that they intended at the expiration of the term of the franchise granted to Easton by the resolutions and the agreement and the by-law of the 22nd of July, 1861, and other franchises subsequently granted by the municipal council at different times for the said term to the Toronto Street Railway Company, to assume the ownership of the railways of the company and of all real and personal property in connection with the working thereof on payment of their value, to be determined by arbitration. Three arbitrators were duly appointed, of whom two made an award on the 15th of April, 1891, in which they found that " the right and privilege to construct, maintain, and operate street railways upon certain streets in the city of Toronto was granted to the said Easton for the period of thirty years from the date " mentioned in the agreement of the 26th of March, 1861, " only, and not in perpetuity, and that all street railways constructed in the city of Toronto by said Easton, or by the Toronto Street Railway Company, have been constructed and operated under privileges for the same term of thirty years and not in perpetuity," and in valuing the said railways they did not allow anything for the value of any privilege or franchise extending beyond the said period of thirty years.

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TORONTO STREET RAILWAY CO.
v.
CORPORATION OF THE CITY OF TORONTO.

The first question in this appeal is, whether this valuation is right; the appellants contending in the lower Courts, and before their Lordships, that the Act of 1861 conferred a perpetual franchise or statutory right to use the streets for the purpose of the railway; and that this is property in connection with the working of the railway, which should be valued. Their Lordships do not accede to this. Their opinion is well expressed in the judgment of Burton, J., who says: "The agreement and the by-law expressly limit the grant of the privilege to thirty years, a definite and certain date; but they contain an additional provision that, on notice six months previously to the expiry of that term of the intention of the corporation to assume the ownership of the railway and all real and personal property in connection with the working thereof, they may do so at a valuation. It is true that the agreement provides that, if the corporation should fail to exercise its option of assuming the ownership, the grant shall continue for a further period of five years, and so at the expiration of each succeeding five years, but that contingency never arose. We are dealing, therefore, with the license or consent given for that fixed term of thirty years, at the expiry of which, according to my reading of the agreement, the corporation having elected to exercise its option of purchasing, the privilege or franchise of the railway company ceased." Their Lordships cannot usefully add anything to this opinion.

It has been seen that the railway was first made upon three streets only, and is said to have been then only eleven miles in length. It was subsequently extended to other streets, partly by agreements between the city and the company, dated the 29th of July, 1881, and the 29th of July, 1884, and partly informally by resolutions of the council requiring an extension, the total length being said to be now sixty miles. Another objection taken by the appellants to the award is, that one period of thirty years is applied to all the street railways. The answer to this is that the Act of 1861 gives power to construct a railway upon and along any of the streets or highways in the city of Toronto and the adjoining municipalities. All the lines were intended to form part of one system, and must be subject to the same condition as to the termination of the privilege. Any other construction would cause great inconvenience and confusion in the working of the railway. The agreements of 1881 and 1884 expressly provide that the lines then agreed upon shall, when built, be considered as coming to all intents and for all purposes within the operation of the former agreement, by-laws, and statutes, except as therein otherwise expressly provided. It may be presumed that the other extensions where there was no formal agreement were made on the same conditions.

Only one other question remains. By the agreement of 1861 Easton was bound to pave or macadamize and keep in repair the roadway between and within at least one foot six inches from and outside of each rail. By an Act passed in 1876 the company were bound to use the same materials and mode of construction as was from time to time adopted for the remainder of the street by the city. By another Act passed in 1877 this Act was amended, and it was provided by sect. 4 that the company should have the option of constructing their portion of the pavement of any street occupied by them, or that at their request the corporation should construct it and assess an annual rate upon the company, covering interest and a sinking fund not exceeding $2 50 cents per square yard, with power to the corporation to raise such sum by the issue of debentures, and to collect the same in the manner provided under the municipal Act for the construction of local improvements. The 5th section provided that, if the corporation should elect to assume the railway, the arbitrators should estimate as an asset of the company the value to the company of any permanent pavement thereafter constructed or paid for by the company, "for the balance of the life of the pavement." Debentures were issued by the corporation, and disputes having arisen between it and the company, an agreement was made between them on the 19th of January, 1889. By that it was agreed that, from the 31st of December, 1888, the company was to pay the city, in lieu of all claims on account of debentures maturing after that date, and in lieu of the company's liability for construction, renewal, maintenance, and repair in respect of all portions of the streets occupied by the company's tracks, at the rate of $600 per mile of single track (or $1200 per mile of double track) per annum, so long as the franchise of the

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company to use the said streets or any of them then extended; and that such payments should be accepted by the city in full satisfaction and discharge of all claims upon the company in respect of the construction, renewal, maintenance and repair; and that thereafter the city should undertake the work in question. The arbitrators have found that the company is not entitled to be paid for permanent pavements constructed by the city subsequently to the 31st of December, 1888, and have not allowed anything in respect of them. The appellants contend that these pavements are within the provisions of the Act of 1877, and that their value should have been estimated as an asset of the company according to that Act. Their Lordships are of opinion that the arbitrators were right in this matter. By the agreement the city undertakes the construction, renewal, maintenance, and repair of the portions of the streets on its own account, and the annual payments are not made for the construction, &c., but for relieving the company from the liability to it. The pavements ceased by the agreement to be constructed, as they were under the Act of 1877, by the corporation at the request of the company. From that time the annual payment must be considered to be made for the use by the company of that which the corporation constructed and kept in repair.

The result is that, in the opinion of their Lordships, the decision of the Court of Appeal should be affirmed, and they will humbly advise Her Majesty to affirm it and to dismiss this appeal. The appellants will pay the costs of it.

Solicitors for appellant: *Poole & Robinson.*
Solicitors for respondent: *Bompas, Bischoff, & Co.*

[PRIVY COUNCIL.]

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July 21;
Aug. 3.

ATTORNEY GENERAL FOR TRINIDAD AND TOBAGO . . . . PLAINTIFF;

AND

ERICHÉ AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Law of Trinidad and Tobago—Ordinances 4 *of* 1889 *and* 11 *of* 1891—*Jurisdiction of Magistrate—Title to Lands.*

The local Ordinances 4 of 1889 and 11 of 1891, not having the effect of erecting the stipendiary magistrate into a tribunal competent to decide title, *held*, in an action by the Crown to try title, that an order of the Supreme Court quashing such magistrate's conviction of the defendants for trespass on the lands in suit would not sustain a plea of res judicata. Such magistrate had no jurisdiction to decide an issue of title, and the Supreme Court sitting in appeal from him could not exercise a jurisdiction which he did not possess.

APPEAL from an order of the Supreme Court (Jan. 11, 1892).

The question was whether a judgment of acquittal by the Court of Appeal from a stipendiary magistrate in a criminal proceeding against the servants of the defendants for digging pitch on lands alleged to be Crown lands establishes a plea of res judicata against the Crown on an information of intrusion against the defendants to recover possession of the same lands.

The proceedings are stated in the judgment of their Lordships.

Sir *Horace Davey*, Q.C., *Warner* of the Colonial Bar, and *G. Lawrence*, for the appellant, contended that it was impossible that civil proceedings for the recovery of land could be barred in the way decided by the lower Court. The former proceedings relied upon for that purpose were taken under the Ordinances of 1889 and 1891, were criminal in their nature, or at any rate in personam, and did not purport to involve a decision as to title. Moreover, the magistrate, even if he could incidentally

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* *Present:*—LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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investigate title, had no power to decide it; and, of course, the order of the Court of Appeal could have no higher effect. The judgment relied on in this case was a simple acquittal in a criminal case; and merely meant that whoever was entitled to the land it had not been trespassed on. No order was made thereon which could operate as an estoppel. Reference was made to *Nelson* v. *Couch* (1); *Reg.* v. *Hutchings* (2); *Barrs* v. *Jackson* (3); *Falkland Islands* v. *Reg.* (4); *Dover* v. *Child* (5); *Reg.* v. *Inhabitants of Hartington Middle Quarter* (6). They were stopped by their Lordships.

Mayne (Sir *R. Webster*, Q.C., with him), for the respondents, contended that the effect of the proceedings relied upon by the Court below was to establish the title of the respondents as res judicata. There was a distinct adjudication, when the conviction proceeding was quashed, that the land was not Crown land originally, and had not become so by subsequent forfeiture, which was binding at least between the Crown and the respondents. The Crown had created a special tribunal to decide the title to Crown lands for one purpose, and was bound by that decision for every purpose which involves the same question. The effect of the Ordinances of 1889 and 1891 was to give the magistrate full power, and to cast on him the duty to decide the question of at least the title to Crown lands in the Colony. The decision of the tribunal was against the title of the Crown to these particular lands, and the same issue could not be raised again in proceedings altered for that purpose. Reference was made to *Flitters* v. *Allfrey* (7).

Counsel for the appellants were not heard in reply.

The judgment of their Lordships was delivered by

1893
Aug. 3.

LORD HOBHOUSE:—

In this case Her Majesty's Attorney General for Trinidad and Tobago is taking proceedings by information of intrusion and

(1) 15 C. B. (N.S.) 99.
(2) 6 Q. B. D. 300.
(3) 1 Y. & C. 585.
(4) 1 Moore's P. C. (N.S.) 299.
(5) 1 Ex. D. 172.
(6) 4 E. & B. 794.
(7) 10 C. P. 29.

by writ of summons against the defendants, for the purpose of asserting the title of the Crown to an estate called Mon Repos, of which the defendants are in possession, and from which they are or were getting asphalt. The defendants moved to stay proceedings, on the ground that the question of title between them and the Crown had already been decided in a previous litigation, and that the present proceedings were frivolous and vexatious. This motion was refused by Rayner, J.; but on appeal to the Supreme Court it was allowed, and an order was made on the 11th of January, 1892, to the effect that the present action should be dismissed as frivolous and vexatious, the question at issue therein being already res judicata. And by the same order an injunction, which had been granted by Rayner, J., against the defendants, was dissolved with costs.

The Supreme Court have thus refused to hear the case on its merits, and as the Attorney-General has appealed to Her Majesty in Council against that decision, this Committee has to examine the previous litigation, in order to see whether it was such as to preclude the Crown from asserting its claim afterwards.

By Ordinance 4 of 1889, it was enacted that the digging of asphalt on Crown lands without a licence should be an offence against the Ordinance, for which the person digging might be arrested, and be punished on summary conviction before a justice of the peace. And the person accused of digging was put to prove either that he was not in fact engaged in digging asphalt from Crown lands, or that he had a licence to do so; otherwise he was to be held guilty.

As it was found that under this Ordinance the jurisdiction of the magistrate was ousted directly a question of title was raised, another Ordinance (No. 11 of 1891) was passed to avoid that obstacle. Sect. 1 enacts as follows:—

"1. Notwithstanding any Ordinance or law to the contrary, it shall be lawful for any stipendiary or other justice to hear and determine any case wherein any person may be charged with an offence under any or either of the said Ordinances respectively, and notwithstanding that any question shall or may arise or be set up in any such case as to the title to any lands alleged to be Crown lands, or any interest therein or accruing therefrom."

Sects. 2, 3, and 4 declare that any party dissatisfied with the decision of the stipendiary or other justice, may appeal to the Supreme Court, which may reverse or confirm in whole or in part the order or decision appealed against, or may give such new or different order or decision as in its discretion it may think fit, and may receive new evidence.

Sect. 5 enacts that a person against whom an order is made or who is convicted by any stipendiary justice of the peace, shall not, and that persons claiming under him shall not, after the order or conviction, and before the Supreme Court in case of appeal has given judgment for the appellant, dig asphalt from the lands in question. This would seem to be for the purpose of protecting the property pending appeals; but whatever its exact intention may be, it cannot cover the scope of a civil suit, for it does not apply to cases of acquittal, when no order is made against any one.

On the 22nd of May, 1891, certain persons, who for this purpose may be taken as identical in title and interest with the present defendants, were charged before Mr. Rayner, stipendiary magistrate of La Brea, with digging asphalt on Crown lands. These lands were the estate of Mon Repos. A question of title was set up, and Mr. Rayner heard some evidence on it. On the 2nd of June he convicted the defendants. They appealed to the Supreme Court, who on the 16th of June adjudged that the conviction should be quashed. Nothing beyond this bare statement, except Mr. Rayner's notes, appears on the record of the criminal proceedings. The present proceedings were commenced immediately afterwards, viz. on the 20th of June, 1891.

Nobody contends that as an ordinary rule a criminal proceeding can be conclusive on a question of property between the Crown and the accused, and when the result is an acquittal, it can hardly be conclusive of anything beyond that particular prosecution. What has been contended at the Bar is that the magistrate in this case was bound to try the question of title; that the accused could not escape conviction except by shewing that Mon Repos was not Crown land; and that such was in point of fact the ground on which the Supreme Court quashed the conviction.

That Mr. Rayner could not have properly convicted the accused unless he had been satisfied that they failed to shew that Mon Repos was not Crown land is pretty plain. But that in acquitting the accused the Supreme Court thought they were passing a decision on the question of title is by no means clear to their Lordships. Indeed, they gather from the statements made in this case by the learned Chief Justice, who also presided in the criminal appeal, that the investigation into the title was of a slight and informal character, though it may have been sufficient for the decision of the criminal charge; that the Chief Justice himself expected that the Crown would come again to raise the question in a more formal and comprehensive manner; but that when the Crown did so come, he thought that it ought not to dispute what he considered were the findings of a Court which the Crown itself had created and had put in action.

But whatever may have been the exact intention of the Supreme Court in quashing the conviction, it is clear to their Lordships that the Ordinances in question have not the effect of erecting the stipendiary magistrate into a tribunal for the decision of questions of title. The later Ordinance provides that setting up a question of title shall not, as so often happens, limit the jurisdiction of the magistrate. He is to go on to hear and determine the case, notwithstanding the question of title. That question may or may not enter into his determination; he may undoubtedly examine it so far as necessary for his judgment; but the case he is to hear and determine is the criminal charge, not the title to the property. Their Lordships hold that the magistrate is not a Court of competent jurisdiction to decide the question of title; and that the Supreme Court, sitting in appeal from him, has still only the criminal charge before it to hear and determine, and has no greater jurisdiction than the magistrate himself.

It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of res

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judicata the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the point. In the *Duchess of Kingston's Case* (1), which is constantly referred to for the law on this subject, it is laid down that in order to establish the plea of res judicata the Court whose judgment is invoked must have had jurisdiction and have given judgment directly upon the matter in question; but that if the matter came collaterally into question in the first Court, or were only incidentally cognizable by it, or merely to be inferred by argument from the judgment, the judgment is not conclusive. In the present case the question of title is only incidentally cognizable by the magistrate, and by the Court sitting in appeal from him. It is true that the Ordinance of 1891 gives the magistrate greater latitude in dealing with criminal charges involving questions of title than is usually accorded to criminal Courts of summary jurisdiction. It is true also that the provisions of sects. 3 and 4 give to the Supreme Court powers of passing orders and of receiving new evidence which are not usual in such cases, and that the provisions of sect. 5 are of a peculiar kind. But all these provisions are subordinate to the issue which by sect. 1 is to be heard and determined, viz., the criminal charge; and they are far from erecting a criminal Court of summary jurisdiction into a civil Court for litigations concerning property.

Their Lordships are of opinion that the full Court should have dismissed with costs the defendants' appeal from the orders of Rayner, J., and that a decree should now be made discharging the order appealed from, restoring the orders of Rayner, J., and directing the defendants to pay to the appellant his costs of the appeal to the Supreme Court. They must also pay his costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for appellant: *Sutton, Ommanney, & Rendall.*

Solicitor for respondents: *W. T. G. Hooper.*

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(1) Sm. L. C. vol. ii. p. 642.

[PRIVY COUNCIL.]

J. C.*

1893

June 30; Aug. 3.

MUNICIPALITY OF PICTOU . . . . DEFENDANT;

AND

GELDERT . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Law of Nova Scotia—County Incorporations Act, 1879—*Construction—Non-feasance—Claim for Damages.*

Public corporations to which an obligation to keep public roads and bridges in repair has been transferred are not liable to an action in respect of mere non-feasance, unless the legislature has shewn an intention to impose such liability upon them.

In an action for damages for injuries caused by the neglect of the appellant municipality to repair a bridge, *held*, that by the County Incorporations Act, 1879, under which it was incorporated, that there was no indication of an intention to impose the liability sought to be enforced.

Sanitary Commissioners of Gibraltar v. *Orfila* (15 App. Cas. 411) followed.

The *Bathurst Case* (4 App. Cas. 256) distinguished.

APPEAL from a decree of the Supreme Court, affirming by a majority a decree of Meagher, J., in favour of the respondent.

The question in the appeal was, whether the County Incorporations Act, 1879, imposed on a municipality incorporated thereunder a liability in damages to persons injured by reason of non-repair of the highways within the district.

The facts are stated in the judgment of their Lordships.

Finlay, Q.C., *Borden*, Q.C. (Nova Scotia), and *Gore*, for the appellant, contended that by the common law of England, which prevailed in Nova Scotia, no action by a person injured by non-repair of roads or bridges within the county could be maintained. The Act of 1879 did not confer such right of action, nor did it create any new liability on the part of the appellant in respect of non-repair of highways within the district. The

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HALSBURY, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

Act of 1879 with certain amendments forms c. 56 of the Revised Statutes of Nova Scotia (5th series, 1885). If sect. 82 of that Act imposed a duty on the appellant to repair, it did not impose it as a duty to the respondent, nor did it give to the respondent a personal remedy in case of damages resulting to him from non-repair. The distinction relied upon was that between non-feasance and misfeasance. In *Borough of Bathurst* v. *Macpherson* (1) there was a clear case of misfeasance, and the judgment when examined appears to have been exclusively rested on that ground. There is no liability of the appellant for non-feasance unless the Act clearly intended to impose it. Reference was made to *Cowley* v. *Newmarket Board* (2); *Hartnell* v. *Ryde Commissioners* (3). [LORD HALSBURY:—While writing on *Cowley's Case* (2) I entertained a strong doubt whether *Hartnell* v. *Ryde Commissioners* (3) could be maintained. THE LORD CHANCELLOR:—The dictum in *Couch* v. *Steel* (4) has been strongly disapproved by Lord Cairns.] See also *Sanitary Commissioners of Gibraltar* v. *Orfila* (5). The effect of these decisions is to overrule the law as laid down in the Nova Scotia decisions, viz., in *Walker* v. *City of Halifax* (6); *M'Quaine* v. *Municipality of St. Mary's* (7); *Watson* v. *Municipality of Halifax* (8). The judgments in these Nova Scotia cases practically proceed upon an erroneous view of the decision in the *Bathurst Case* (1).

The respondent did not appear.

The judgment of their Lordships was delivered by

1893
Aug. 3.

LORD HOBHOUSE:—

The plaintiff in this case resides within the municipality of Pictou, and he sues the corporation for neglect of its duty to repair a bridge, whereby severe injuries were caused to the plaintiff. His allegations are that the defendants were in possession and had the management and control of the public highway over the bridge in question, and were liable and bound

(1) 4 App. Cas. 256.
(2) [1892] A. C. 345.
(3) 4 B. & S. 361.
(4) 3 E. & B. 402.
(5) 15 App. Cas. 411.
(6) 16 N. S. Rep. (N.S.) 371.
(7) 18 N. S. Rep. (N.S.) 493.
(8) 18 N. S. Rep. (N.S.) 449.

to maintain, repair, and keep in repair the said highway and bridge, and the approaches thereto; and that the defendants negligently, improperly, and wrongfully suffered the said highway, bridge and approaches to become out of repair and dangerous to persons passing. The judge who tried the cause, and on appeal the majority of the Supreme Court, have found in favour of the plaintiff.

It is not denied that the approach to the bridge was out of repair, or that severe injury was caused to the plaintiff thereby. The defendants relied on several grounds of defence, some of which have not been raised again before their Lordships. Two have been argued at length, one that the highway in question is one of the great roads of the province, and the other, that before the plaintiff was injured it had come under the provisions of the Bridge Act; and in either case it is contended that the place was removed from the control and cognizance of the municipality. Their Lordships desire to pronounce no opinion on those points, because they think the case should be decided upon a broader and more general question, viz., the question whether the statutes, by which the powers and duties of the defendants are regulated, have imposed upon them a liability to repair, and made them liable in damages for mere non-feasance at the suit of a private person.

This question does not appear to have been discussed at the trial, probably for the reason that it is governed by some decisions in the Colony. But in the Court of Appeal it is treated at length by Weatherbe, J., who dissented from the judgment of the rest of the Court. And that learned judge refers to both the novelty and the importance of the question in terms which shew how desirable it is to have an authoritative decision upon it. He says: "Previous to the passage of the General Act 'Of County Incorporations' in 1879, no attempt was made to charge a county with liability for negligence for non-repair of a road or bridge. Since the passage of that Act such suits and claims have become frequent, and are of a character which must soon call for special enactment, because now the municipal corporations are in this condition, that if by law they are to be held liable for non-repair of roads and bridges, not having and not being able to obtain the money to keep them in repair, the liability of counties for damages is likely to become an intolerable burden in communities where, as is the case in many parts of the province, the population is sparse, and road and bridge making and maintaining difficult." It is unfortunate that the respondent does not appear in this case; but the appellants' counsel have endeavoured to supply the omission by a very full reference to the statutes and decisions bearing on the question.

By the common law of England, which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair.

This was first held in a case in which the inhabitants of a county were sued, and as they were not a corporation there was a technical difficulty in suing them; but that the decision did not rest on this technical difficulty alone, but on the susbtantial ground of non-liability, was subsequently decided when the difficulty had been removed by enabling a public officer to sue and be sued on behalf of the county. And the same conclusion has been arrived at where the obligation to repair has been transferred to corporations.

The latest English case is that of *Cowley* v. *Newmarket Local Board* (1), decided in the House of Lords. It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed.

The law was laid down by this Board in the case of *Sanitary Commissioners of Gibraltar* v. *Orfila* (2), thus: "In the case of mere non-feasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the Commissioners a duty towards himself which they negligently failed to perform."

(1) [1892] A. C. 345.

(2) 15 App. Cas. 411.

The question then is, whether any statute has given to private persons the right of action now claimed against this municipality which does not exist at common law.

Now, the defendants were incorporated by a general law passed for incorporating the inhabitants of every county and district in the province, among them the county of Pictou. The law was passed in 1879, and with some amendments now forms cap. 56 of the Revised Statutes of 1885. It is known as "The County Incorporations Act." Prior to that Act the law as to highways appears to have been the common law, modified by an Act passed in the year 1761. It was thereby provided that the grand juries for the several counties should elect annually two surveyors of highways for each town in the county. The duties of the surveyors were to enforce and regulate the labour which the inhabitants were bound to supply for highways and bridges, and the limits of which were fixed by the Act.

By sect. 79 of the County Incorporations Act the municipal councils are directed to appoint a sufficient number of overseers of highways, road surveyors, and other officers. And by sect. 82 it is enacted that the powers and authority of a municipal council shall extend to a number of objects stated in thirteen sub-sections. So far as regards the present question the objects are as follows:—

In sub-sect. 1. The laying out of new roads, and the making, maintaining, or improving of any new or existing road, or stopping up, altering, or diverting the same.

In sub-sect. 2. The appropriating of road or bridge money granted by the legislature, and to provide for raising and appropriating such sums of money as the county or district council shall from time to time consider necessary to make, maintain, repair, alter, or improve any roads, bridges or streets, to be raised in rates in the nature of county rates; provided that no greater sum than $1000 for such purposes be raised and assigned in any one year in any one municipality without the consent of the Governor in Council.

In sub-sect. 3. The collecting and enforcing the performance of statute and highway labour.

In sub-sect. 4. The appointment of superintendents of roads, with such powers as regards the roads and bridges, and the expenditure of provincial and municipality money and statute labour therein as the council shall see fit to confer, and the erection, preservation, and repair of any new or existing bridge; with various other matters.

The first observation that occurs on these provisions of law is, that under the Act of 1761, the liability to maintain roads and bridges lay upon the inhabitants, and that this liability is preserved by the County Incorporations Act, which contemplates the enforcement of statute and highway labour.

It is to be observed further that the statute does not in terms impose any obligation upon the municipality to repair the roads or bridges. It confers upon the council powers and authorities which extend to those objects; but the powers and authorities are conferred in precisely the same terms with reference to objects with regard to which the powers clearly must be discretionary and not matters of obligation.

In the opinion of their Lordships, it is impossible to find in any of the legislative provisions the indication of an intention on the part of the Legislature that a person injured by the mere non-repair of a road or bridge should be entitled to sue the municipality for damages in respect thereof.

It remains to look at the decisions which the Colonial Courts have passed on the point. The first is in the case of *Walker* v. *City of Halifax*, decided in the year 1883 (1). The plaintiff sued the city for not removing the lumps of ice and snow which had formed in the streets. In delivering judgment, Thompson, J., referred to the great differences of opinion which had prevailed both in England and the United States, both on the main question of liability and on the proper interpretation of the case of *Russell* v. *The Men of Devon* (2). He thought the Nova Scotian Court should hold themselves bound by the views of this Committee in the *Bathurst Case* (3). Those views appeared to him to be that the difficulty in *The Men of Devon Case* (2) was merely technical; that wherever an indictment will lie for default of duty, a person specially injured by the same default may sue for damages; and that if the statute incorporating the municipal body creates a new liability, it creates a liability to be sued in a private action. In the *Halifax Case* (1) he considered that, on their incorporation, in the year 1841, the city took over powers then vested in commissioners for enforcing statute and highway labour; that in 1853 they received power to appoint superintendents, whose duty it should be to repair; and that the possession of these powers made them liable to the plaintiff.

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(1) Nova Scotia Rep. vol. xvi. p. 371.

(2) 2 T. R. 667.

(3) 4 App. Cas. 256.

In the next year was decided the case of *McQuarrie* v. *Municipality of St. Mary's* (2). The plaintiff sued on the ground of negligence, in permitting a bridge to be out of repair. The judgment of the Court was delivered by the same learned judge. He said that the only distinction between this and the *Halifax Case* (1) was that St. Mary's was incorporated by the County Incorporations Act instead of by private charter. He considered that as the care of roads was vested in the corporation with power to raise money, to direct expenditure, and to make by-laws, they received new and original, and not merely transferred, powers; and so were subject to new liabilities, among them the liability to be sued in private actions. He was also at pains to shew that in the *Bathurst Case* (3) the leading considerations were that the inhabitants were liable at common law to repair; that the care of repairs was vested in the corporation when formed, and that it received original and new powers. These views have apparently been accepted in the Colony till the present case arose.

Their Lordships' remarks have already answered the reasoning in the *St. Mary's Case* (2) upon the County Incorporations Act. Nobody can contend, and it seems that nobody ever has contended, that by the common law or the Act of 1761 the inhabitants or their surveyor could be sued for mere non-feasance in a private action. If nothing can be found in the County Incorporations Act to fix that liability upon the corporations thereby formed it does not exist. But, further, it appears to their Lordships that the *Bathurst Case* (3) has not been correctly interpreted in the Nova Scotian decisions. Whatever general views are stated in that case, must, as in all cases, be taken with reference to the facts. And it is clear to their Lordships that the governing fact in the *Bathurst Case* (1) is that the conduct complained of was not in the view of the Committee non-feasance, but misfeasance. In delivering the judgment of the Committee Sir Barnes Peacock expressly says that they do not decide whether the legislature threw upon the municipality the obligation of keeping in good repair the works it took over. The ground of the decision was that the municipality having, under the powers conferred upon them, constructed a drain which, unless kept in proper condition, would cause a nuisance to the highway, were bound to keep this artificial work in such a condition that no nuisance should be caused, and that if owing to their failure to do this the highway subsided and a nuisance was created, they were as much liable for a misfeasance as if they had by their direct act made the hole in the road which constituted a nuisance to the highway.

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(1) Nova Scotia Rep. vol. xvi. p. 371.

(2) 17 Nova Scotia Rep. 493.

(3) 4 App. Cas. 256.

The case, therefore, differs from that before their Lordships, where the only charge that can be made against the defendants is that they failed to repair the approach to the bridge.

The result is that, in their Lordships' opinion this appeal should prevail, and the judgments below should be discharged and the action should be dismissed. But, as regards costs, considering the state of decisions in the Colony, the general nature of the question, and the importance of a decision to municipal corporations, their Lordships think it reasonable that the parties should bear their own costs here and below.

They will humbly advise Her Majesty accordingly.

Solicitors for appellant: *Bompas, Bischoff, & Co.*

(1) 4 App. Cas. 256.

[PRIVY COUNCIL.]

J. C.*
1893
April 26; July 22.

DE QUETTEVILLE . . . . PLAINTIFF;

AND

HAMON (PERRÉE) . . . . DEFENDANT.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey—Inheritance—Collateral Succession—Right of Representation.

Held, that the respondent, as grand-daughter to the deceased's eldest sister, was, as principal heir, entitled to the deceased's personal and acquired real estate, in preference to the appellant, who claimed as son of the second sister of the deceased.

The principle of representation in regard to personal and acquired real estate was introduced in the case of collaterals by the Jersey enactments of 1851 and 1873, and the right so conferred is complete and general, and is not subject to any exception.

APPEAL from a decree of the Superior Number of the Royal Court (May 26, 1892), reversing a decree of the Inferior Number (Sept. 14, 1891).

The facts and proceedings are stated in the judgment of their Lordships.

Jenkins and *Hawksford,* for the appellant, contended that he, as the nephew and nearest in blood of Marie Nicolle, deceased, was her "principal heir" in priority to the respondent, her grand-niece, and as such was entitled to the "saisine" of her acquired real estate and her personal estate for distribution between himself and his co-heirs. The respondent relied, first, upon the 2nd article of a Jersey enactment passed on the 13th of February, 1851, and confirmed by Her Majesty in Council on the 14th of April, 1851, to the effect that "in collateral successions to personalty and purchased realty the sons and daughters of the brothers or sisters of a person deceased shall represent such brothers and sisters in the division of the estate of such deceased." Second, upon another enactment of the States

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* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD SHAND, and the HON. GEORGE DENMAN.

(March 26, 1873), confirmed by order of Her Majesty's Council (May 5, 1873), to the effect that the provision of the above art. 2 shall "be extended to great-nephews and great-nieces of a deceased person, they being called into the division of the estate as representing their deceased grandfather or grandmother." It was contended that these laws did not avail to confer upon the representative of a deceased person all the rights which would have devolved upon the person represented; so that the respondent did not become "principal heir" merely because her grandmother would have been principal heir had she survived. The enactments did not alter the previous law in that respect. All that they did was to allow nephews and nieces, and great-nephews and great-nieces, to share in the distribution of successions from which they had previously been excluded, and that effect could not be arbitrarily extended. By the previous law, in all collateral successions to personalty and acquired realty (conquêts et acquêts), the quality of "principal heir" devolved upon the nearest in blood. The commentators on the Coûtume de Normandie explain that that means the one who is nearest to the deceased in degree of consanguinity, male or female, without distinction of the paternal or maternal side. The appellant answered that description, and was consequently entitled to the "saisine" claimed. See Recueil des Lois, tom. ii. pp. 2, 3; tom. iii. p. 78. [LORD WATSON referred, by way of illustration, to 18 & 19 Vict. c. 23, s. 1, which introduced the right of representation as to personalty into Scotland, but added a proviso.] Reference was made to *Mourant* v. *Gaudin* (1), before the Royal Court in 1877, on which the decree of the Inferior Number in this case was based.

Venables Vernon, Q.C. (*Attorney General of the Island*), and *Dennis*, for the respondent, contended that the effect of the enactments in question was that the respondent was entitled to represent her grandmother, and that such right of representation conferred upon her all the rights which her grandmother would have had, including the right to "saisine," and was not limited in the way alleged by the appellant. It is admitted that the

(1) Unreported.

respondent is principal heir to the "propres" of the de cujus, i.e., to her patrimonial or inherited real estate. Had the succession been in the direct line instead of collateral, no distinction could have been drawn between the propres on the one hand and the personal and acquired real estate on the other. Seisin of the whole would have vested in the principal heir. It was contended that the respondent was so entitled, notwithstanding her succession was collateral, and that there was no sufficient reason for drawing any distinction applicable to her case.

It was contended that the plain words of the enactments supported that view. It was also supported by the system of representation recognised by the law of Jersey, as that law existed in 1851 and had existed for centuries in the succession of all kinds of property in the direct line, and of "propres" in the collateral line. The representation introduced by the enactments was intended to be of the same description as that already existing. No reason had been given for drawing any distinction, and the object of the new enactments obviously was to assimilate the rules of collateral descent to those of lineal descent. It was contended that *Mourant* v. *Gaudin* was wrongly decided, and that the Superior Number were right in this case in refusing to follow it. Notwithstanding that decision, the practice in Jersey relating to this subject has been in accordance with the contention of the respondent as affirmed by the judgment under appeal.

Jenkins, replied.

1893
July 22.

The judgment of their Lordships was delivered by

Lord Shand:—

The appellant in this case claims right to the character of "principal heir," and as such entitled to the "saisine" of the personal estate and acquired real estate of his aunt, Marie Nicolle, who died on the 9th of August, 1891, a widow without issue, possessed of both real and personal estate in Jersey. The Royal Court of Jersey, by a judgment of the 14th of September, 1891, sustained the appellant's claim; but this decision was reversed by a judgment of the Superior Number of that Court on the 26th of May, 1892, by which it was decided that the respondent is the principal heir of Marie Nicolle, who was her grand-aunt. The matter in controversy between the parties is, which of these decisions is in accordance with the law of Jersey ; or, in other words, which of the two parties is the principal heir of the deceased.

The appellant, being the nephew of the deceased Marie Nicolle, the "de cujus," as she is called throughout the proceedings, which relate entirely to her estate, is one degree nearer in blood to her than the respondent, who is a grand-niece ; but, on the other hand, the respondent is a grand-daughter (and the eldest grand-daughter) of Marie Nicolle's eldest sister, while the appellant is a son of her second sister. She had four sisters, all of whom predeceased her. Three of them left issue, and her estate real and personal, according to the law of succession in Jersey, falls to be divided amongst the descendants of the three sisters.

There is no doubt that the respondent as the nearest heir in the line of collateral succession is the "principal heir" of the de cujus, as regards her inherited real estate (propres), taking by representation through her mother and grandmother. It is equally clear that but for the legislation of the States of the Island in 1851 and 1873 the appellant in the circumstances which here occur would have been the principal heir of the de cujus in personal and acquired real estate, taking, not by way of representation through his mother, but in his own right as the nearest in blood. But by the enactment of 1851 representation in regard also to personal and acquired real estate (meubles, prises, conquêts et acquêts) was introduced in the case of collaterals ; for it was thereby provided in reference to such estate that the sons and daughters of brothers or sisters of a person deceased should represent them in the division of the estate, and that the persons thus called to the succession should take per stirpes. The words of the enactment on which the question to be now determined really turns, as contained in the Réglement passed by the States of the Island on the 13th of February, 1851, and confirmed by an Order in Council of the 14th of April, 1851, are these :—

Art. 2. "Dans les successions collatérales de meubles et acquêts, les fils et filles des frères ou sœurs du défunt décédés les représenteront dans le partage de sa succession. Le partage de ces successions, où les fils et filles des frères ou sœurs seront appellés, aura lieu par souche."

It is unnecessary to quote the terms of the enactment of 1873 at length. The law is thereby extended beyond nephews and nieces to the case of grand-nephews and grand-nieces of the deceased: "Aux petits-neveux et petites-nièces du défunt, les appellant au partage par voie de représentation de leur grand-père ou grand-mère décédé."

The appellant's argument involves the proposition that by these enactments a peculiar and limited, and not a complete and general right of representation, was introduced in the case of collateral succession to meubles et acquêts. It is not disputed that if the enactment of 1851 conferring on nephews and nieces the right of representation of their parents had used the words "les représenteront dans sa succession," the respondent must succeed in the present controversy. But it was said the words "dans le partage" preceding the words "de sa succession" limit the right of representation, so that the respondent does not take the right of principal heir entitled to the saisine of the estate in question, which her grandmother would certainly have done had she survived the de cujus.

The sole question then is, whether the expression "dans le partage" includes or excludes the claim to be principal heir, and for the purpose of answering that question it is necessary to inquire what was the position of principal heir when the law of 1851 was passed. The principal heir was selected by the law to represent the estate of the deceased. He took possession of the whole estate, received the income until partition was sought, and after a time, if no partition (by clameur de partage) was sought, became absolute owner. In the partition which took place, certain valuable preferences were accorded to him, such as a prior choice among indivisible parcels of the property, and other privileges which need not here be particularly specified.

At the same date the succession to the meubles et acquêts of the de cujus would have devolved upon those who stood nearest to her in degree or blood, so as to give the whole to the surviving members of the generation nearest to her and to exclude the issue of others who had predeceased her.

The law of 1851 makes an alteration in favour of issue so excluded, and it does so by providing that nephews and nieces of the deceased shall represent their deceased parents in the partage of the succession, and that the partage shall take effect per stirpes. The law of 1873 does the same in favour of grand-nephews and grand-nieces.

It is very difficult to suppose that, when effecting this great change from a division per capita to one per stirpes, and so assimilating the successions in question to lineal successions and to successions of propres, the Legislature did not intend to affect every kind of beneficial or proprietary right which successors take from their predecessor, but did intend that as to one class of benefits or rights representation should take effect, and as to another it should not. Such a result can only be arrived at by limiting the meaning of the word "partage" in a way which appears to their Lordships very strained and artificial, and for which no reason has been assigned to them.

Their Lordships, agreeing with the Court of the Superior Number, are unable to construe the enactment of 1851 as introducing any such limited right of representation as that for which the appellant contends. They do not think it is a sound interpretation of the words of the enactment "les représenteront dans le partage de sa succession" to limit their effect to the rights of parties only after a "clameur de partage," or demand for partition, has been made, thus excluding representation as regards the title to the estate, and with the effect of creating a principal heir to take the title only with such advantages as this might possibly give. In their Lordships' opinion the words of the enactment are to be taken in their natural meaning as referring to the whole estate and succession of the deceased, and as providing that the parties called shall represent their parents in the division or distribution of that estate, which must include the rents or income accruing from the time of the death of the de cujus, so that the nephews and nieces, or grand-nephews and grand-nieces, shall in all respects take the succession as their parents or grandparents would have done. The language used is in itself apt and fitted to convey this meaning, for the "partage" of the succession means simply the division or distribution of the succession, that is, of the whole succession or estate, and not the succession minus a portion of the income as to which representation shall not occur. It cannot be truly said that the issue of one who would have been principal heir if he had survived the de cujus represents his ancestor in the "partage" unless he also becomes principal heir.

If the French law be looked at for an explanation of the word "representer" the same conclusion is arrived at.

In the French Code Civil, art. 739, the right of representation is thus clearly described: "La représentation est une fiction de la loi, dont l'effet est de faire entrer les représentants dans la place, dans la degré et dans les droits du représenté." There is no reason to suppose that the Jersey legislators used the word in any different sense. But the appellant's contention here is that the person having the right of representation does not take the same place nor the same rights as his or her ancestor would have done. If such an exception had been intended it appears to their Lordships that the general terms used would have been expressly qualified by a provision that the representation should not include representation in title with its resulting advantages.

The decision of the Inferior Number of the Court of Jersey in this case was rested entirely on the authority of the judgment in a case of *Mourant* v. *Gaudin*, decided by the Court of the Superior Number on the 13th of May, 1877, which the Inferior Number in this case held to have determined that the enactments of 1851 and 1873 did not confer the right of saisine and the quality of principal heir in moveables and acquired real estate on the descendants of brothers and sisters of the de cujus by way of representation, where the succession had opened in the collateral line. If this case could properly be represented as a judgment to that effect their Lordships would be prepared to hold that the decision was wrong; but an examination of the case shews that it cannot rightly be so regarded.

In the case cited the Court of Inferior Number gave no decision, but in view of the importance of the question raised referred the cause on the pleadings to the Cour d'Assise d'Héritage. The action was raised by one Jean François Mourant to set aside a deed granted by Jean Touzel, the de cujus, in favour of his widow, which it was said he had no power to grant to the prejudice of his principal heir. The widow maintained successfully that the plaintiff had no title to maintain the suit because he had not the quality of principal heir. The plaintiff was a grandnephew of the de cujus by the half-blood only, while the de cujus had been survived by a sister by the full blood, who was still alive when the action was pending. The defendant in that case did not by her pleadings dispute the right of the plaintiff to represent his grandmother to the fullest extent, by virtue of the enactments of 1851 and 1873, but maintained that even his grandmother would have been herself excluded, being a sister of the de cujus by half-blood only, by the surviving sister by the full blood; and this appears to have been the sole question as to the right of succession before the Court when the case was referred to the Cour d'Assise d'Héritage. In the result the Court held that the plaintiff had not the character or quality of principal heir; but the grounds of the judgment are by no means clearly stated. In its concluding paragraph, which seems to be the operative part of the decree, it professes in terms to give effect to the second part of the defendant's argument, that is the argument rested on the objection to the title of the plaintiff as being connected with the de cujus by half-blood only while a sister-german was still alive. In an earlier paragraph it no doubt bears that the enactments of 1851 and 1873 did not by representation confer on the plaintiff the quality of principal heir—a defence not raised on the pleadings; and the two points, either of which was sufficient for the decision, were mixed up in the judgment. The case is for that reason not satisfactory, and it cannot be accepted as a decision of the point now in controversy, for the argument on the distinction between a sister-consanguinean and a sister-german was sufficient as a ground of judgment against the plaintiff.

Their Lordships will humbly advise Her Majesty to dismiss the present appeal and to affirm the judgment complained of, and the appellant must pay the costs of the appeal.

Solicitors for appellant: *Saunders, Hawksford, Bennett & Co.*
Solicitors for respondent: *R. S. Taylor, Son, & Humbert.*

[PRIVY COUNCIL.]

J. C.*
1893
July 13, 14, 15; Aug. 3.

CORPORATION OF RALEIGH . . . . DEFENDANT;

AND

WILLIAMS AND ANOTHER . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Ontario Municipal Act of 1887 (*R. S. O. c.* 184)—*Construction—Damages for Non-feasance—Mandamus—Notice in Writing—Remedy by Arbitration.*

Under the Ontario Municipal Act of 1887 (R. S. O. c. 184) an action for damages lies against a municipality at the suit of any person who can shew that he has sustained injury from the non-performance of the statutory duty of maintaining and repairing its drainage works:—

Held, that sect. 583, sub-sect. 2, applies to a case which falls within sect. 586, and, while prescribing a notice in writing as a condition precedent to a mandamus, does not on its true construction preclude an action for damages without such notice.

In an action brought without notice in writing against a municipality for damages for injury caused to the plaintiffs' lands and for a mandamus to prevent a recurrence of the injury:—

Held, that so far as such injury was occasioned by the municipal drain and embankment being out of repair, or from their not being kept in such a state as to carry off in relief of plaintiffs' land all the water which the drain was capable of carrying off as originally constructed, the action was maintainable:

Held, further, that so far as the injury was occasioned by the negligent construction by the municipality under its statutory powers of another drain the action must be dismissed. The remedy in such case (see sect. 591) was by arbitration as directed by the statute.

APPEAL by special leave from the Supreme Court (June 28, 1892), reversing a decree of the Court of Appeal for Ontario (June 30, 1891), and restoring the judgment of Ferguson, J. (Sept. 4, 1890), which was in favour of the respondents.

The action was for damages occasioned to crops by the overflow of water from different drains constructed under the provisions of the various Drainage Acts and the Government

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* *Present*:—THE EARL OF SELBORNE, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

Drainage Act, one (known as No. 1 drain) by the Government of Ontario, and the other (known as the Bell drain) under the authority of a by-law passed by the council of appellants.

The respondents claimed also a mandamus to compel the appellants to restore, clean out, and repair No. 1 drain, and an embankment made and used as a highway between this drain and their lands, and to stop the flow of water through Bell drain.

The action was by consent referred for report to the county court judge, whose report Ferguson, J., adopted, and decreed a mandamus with $850 damages.

The Court of Appeal was of opinion that there was no evidence before the referee to support his finding that the respondents had given the statutory notices required to create liability on the part of the defendants. They based their decree of reversal on previous decisions of the Court of Appeal; on the view that the Act did not make the corporation responsible for any errors or unskilfulness of the drainage scheme duly adopted by it; and on the view that the respondents' remedy (if any) was not by action, but by arbitration under sect. 591 of the Act in question for compensation for any injurious affecting of their rights.

The Supreme Court was unanimous that the appellant's powers to execute the work were discretionary and not imperative; that the municipality was guilty of negligence in constructing the drains, and bringing down a great body of water without finding an outlet for it, thereby overflowing the respondents' land; that the respondents' remedy was by action, and that they were entitled to a mandamus.

The case is reported in the Supreme Court in 21 Sup. Court Rep. p. 103.

Matthew Wilson, Q.C. (Ontario), and *Avory*, for the appellant, contended that the decree of the Court of Appeal was right and should be restored. The drainage works in question were authorized by the statutes, viz., Ontario Drainage Act (36 Vict. c. 38), now consolidated in the Revised Statutes of Ontario, 1887, c. 36, and the Municipal Act (46 Vict. c. 18), now amended and consolidated in the Revised Statutes of Ontario, 1887, c. 184, and by certain by-laws passed thereunder. The council of the municipality merely adopted plans and specifications of an officer designated in the statute to make the same; and after such adoption passed a by-law authorizing the work so particularly located and laid out. Such action on its part cannot constitute negligence. Nor can the doing of such work so authorized constitute negligence; and accordingly any person whose property is injuriously affected thereby must follow the provisions of the statute when he claims compensation. The engineer or officer designated by the Act is a quasi-judicial officer, and not a servant of the municipality for whose acts and omissions it is in any way responsible. The function of the municipality is to decide whether a scheme of drainage is desirable in the locality, and not as to the particular plans or the merits of the scheme put before them by the statutory officer. Reference was made to *Hopkins* v. *Mayor, &c., of Swansea* (1); *President, &c., and Ratepayers of Colac* v. *Summerfield* (2); *Misener* v. *Township of Wainfleet* (3); *Re Clark and the Corporation of Howard* (4); Beven on Negligence, pp. 222, 225, 235; *Cowley* v. *Newmarket Local Board* (5), on which latter case it was contended that the municipality was not liable to maintain No. 1 drain or the embankment beside it as part of the drainage scheme, that its duty, if any, was as a road authority, and that for non-feasance no action lay. See also *Mayor, &c., of Montreal* v. *Brown* (6). The sole remedy, if any, under the circumstances, accrued to the respondents was by arbitration under the Ontario Drainage Act, and the Municipal Act (R. S. O.), c. 36, ss. 31 (3), 61; c. 184, s. 483. Under the Acts a reasonable notice to repair was a condition precedent to imposing upon the appellant any liability to the respondents so to do; whether that liability was enforceable by action or by arbitration. The Court of Appeal was right in holding that no such notice had been given. Such reasonable notice (see sect. 583, sub-sect. 2) was also a condition precedent to any right to proceed against the appellant either by action, mandamus or arbitration.

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(1) 4 M. & W. 621, 640.
(2) [1893] A. C. 178.
(3) 46 U. C. Q. B. 457.
(4) 14 Ont. Rep. 598, 606.
(5) [1892] A. C. 345.
(6) 1 App. Cas. 384.

H. T. Scott, Q.C. (Ontario), and *William Douglas*, Q.C. (Ontario), for the respondents, contended that the judgment of Ferguson, J., was right, and should be restored. The negligence complained of was that the municipality constructed a large number of drains, and made no outlet for the water brought down thereby from lands on a higher level than that of the respondents, so that the respondents' lands were overflowed and their crops destroyed. In so doing the municipality alleged that it was acting under sects. 569, 602, of the Revised Statutes of Ontario, c. 184. The water was not surface water, which would naturally have overflowed the respondents' lands, but was brought thereon by the appellant's system of draining the higher lands, in which it persisted, although there was nothing to prevent it from providing a proper outlet for the waters, and so avoiding injury to the respondents. This was the damage complained of, and the negligence alleged was the making no outlet; the mandamus sought was for the purpose of restoring the embankment which had been swept away by the water brought down by these drains. The evidence shewed that it was quite possible for the appellant to have constructed its drains without injuring the respondents, and that the injury was caused by negligence. The powers given by the statutes were discretionary and permissive, and not imperative or compulsory. It was the duty of the appellant under the statute to exercise its own judgment on the plans and report of the engineer, if not as to its scientific details, at least as to their practical result and consequences. It was its duty to remit the plans and report to the engineer to be revised, so that their execution would not occasion injury to the respondents. In that way it would have controlled the mode of construction with reference to consequences, without interfering in those details which it was the province of the engineer to decide upon; and its omission so to do was actionable negligence. The respondents' right of action for negligence is distinct from that of compensation for injuries legitimately caused by works authorized by statute. Their remedy in such case—that is, for the consequences of negligence—was not limited to arbitration. Nor is a notice in writing a condition precedent under the statute to an action of that character.

Wilson, Q.C., replied.

1893. Aug. 3. The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

The respondents who were plaintiffs in the action sued the municipality of the township of Raleigh, claiming damages for injury caused by flooding to certain lands in the occupation of the respondent Sarah Ann Williams, and also asking for a mandamus to prevent recurrence of the injury.

The municipality pleaded various defences, and among others they took the objection that the plaintiffs ought to have proceeded by arbitration and not by action.

Without determining this point the learned judge of first instance by consent of the parties referred the action and the matters in dispute to Mr. Bell, the judge of the county court of the county of Kent. Mr. Bell heard evidence at considerable length and viewed the premises on two occasions. He made a careful and elaborate report and determined the action in favour of the plaintiffs. Their Lordships may observe in passing that there is nothing in the terms of reference or in the reference itself to preclude the municipality from relying upon any of the defences which they raised in their pleadings.

Motions were made on the one side to vary and on the other to confirm the report. On the 4th of September, 1890, Ferguson, J., confirmed the findings of fact of the referee and gave judgment in favour of the plaintiffs for $850, the amount found by the referee, and awarded a mandamus, which was not however to issue until further order on a subsequent application.

From this judgment the municipality appealed. On the 30th of June, 1891, the Court of Appeal unanimously reversed the decision of Ferguson, J., and dismissed the action. The plaintiffs then appealed to the Supreme Court, who on the 28th of June, 1892, allowed the appeal with costs and restored the judgment of Ferguson, J., except so far as it awarded a mandamus. As regards this part of the relief sought by the action, the view of the Supreme Court, in which their Lordships concur, was that the plaintiffs were not in a position to claim a mandamus because they had not given the notice prescribed by the statute under which they were proceeding.

The municipality obtained special leave to appeal to Her Majesty in Council on the ground that the appeal involved serious questions of public importance depending on the true construction of the Ontario Statutes relating to the powers and duties of municipalities.

These statutes have from time to time been re-enacted with amendments. The Municipal Institutions Act of 1873 (36 Vict. c. 48), which itself was a Consolidation Act, was followed by the Consolidated Municipal Act, 1883 (46 Vict. c. 18). Then came the Municipal Act of 1887 (R. S. O. c. 184), and that again has been superseded by the Consolidated Municipal Act, 1892 (55 Vict. c. 42). For the purposes of this judgment it will be convenient and sufficient to refer to the Act in the Revised Statutes.

For the purposes of this appeal their Lordships are of opinion that the findings of fact of the referee which have been confirmed by the Supreme Court must be accepted as conclusive.

The lands alleged to have been injured are situated in Raleigh near the River Thames, in a low-lying district known as the Plains.

The injury of which the plaintiffs complained was alleged to have been occasioned substantially by two causes—(1.) the neglect of the municipality in breach of their statutory duty to repair a drain known as Government drain No. 1, and (2.) the negligent construction by the Corporation of another drain known as the Bell drain.

It appears to their Lordships that these two matters of complaint give rise to distinct considerations and must be dealt with separately.

Government drain No. 1 was the first drainage work in the district now known as the township of Raleigh. It was constructed by the Government before the municipality of the township was incorporated. It may be described shortly as a straight cut running from the comparatively high ground bordering on Lake Erie, which is the southern boundary of Raleigh, to the

River Thames, which is its northern boundary. The referee found that it was constructed in the years 1870 to 1873 inclusive along the easterly side of the road allowance between lots 12 and 13 in the township of Raleigh, commencing in the rear of the Lake lots and ending in the River Thames and lying immediately east of lot No. 12 in the fourth concession (in which lot the plaintiffs' lands are situated), and he found and reported—

"That as a part of the plan or scheme of said drain the earth taken thereout was to be thrown up (and as a matter of fact was thrown up) on the west side of said drain as an embankment, in order thereby to prevent the water from said drain and the water flowing into it from the easterly or south-easterly direction from escaping westward on to the lands of said plaintiffs and others."

And he found and reported—

"That it was the duty of said defendants to keep said drain properly cleaned out and free from obstructions, and to keep said embankment in a fit and proper condition."

And then, after finding and reporting that after the completion of the said drain the defendants had constructed a number of other drains leading into it and thereby brought down immense quantities of water far beyond its capacity to carry off, the referee found and reported—

"That said drain No. 1 has been allowed and permitted to become and has become and now is, through the sixth fifth and that part of the fourth concession lying south of the Grand Trunk Railway, badly filled up with earth and silt and badly overgrown with grass and willows, and that its capacity has thereby become much diminished and impaired, and is not and has not for the past five years been one-half of what it was when first completed, and that as the result of this condition and overflow of water on to and over plaintiffs' said lands the damage and injury thereto has been much increased."

The referee also found and reported—

"That the defendants have not kept the embankment on the westerly side of said No. 1 drain up to its original height, nor have they kept it up to the height that it was after the earth thrown up as aforesaid had become firm and settled, and when breaks have been made in the said embankment by the water overflowing as aforesaid the defendants have permitted these breaks to remain for a long time wholly unrepaired, and when repaired they were repaired in an inefficient and inadequate manner and still left lower than the road bed on the north-west or south-east of said breaks, thereby enabling or permitting water to escape on to and to flow over the plaintiffs' said land, and damage and injure the crops thereon that would otherwise have been carried down No. 1 drain to the River Thames."

The Municipal Act in express terms imposes upon every municipality the duty of preserving, maintaining, and keeping in repair drainage works within its own limits, and that whether the drainage work is a work constructed by the municipality or a work constructed by the Government before the municipality was incorporated (sects. 583, 586, 587, 589). Sub-sect. 3 of sect. 583 declares that the deepening, extending, or widening of a drain in order to enable it to carry off the water it was originally designed to carry off is to be deemed to be a work of preservation, maintenance, or keeping in repair, within the meaning of the section. Sect. 583 seems to apply when the drainage work is carried into or benefits lands in two or more municipalities. Sect. 586 seems to apply where the work and the lands benefited are within the limits of one and the same municipality, as is the case in the present instance.

It was not disputed, and their Lordships see no reason to doubt, having regard to the purview of the Legislature of Ontario in the Municipal Act, and the language there employed, that an action for damages against the municipality lies at the suit of any person who can shew that he has sustained injury from the non-performance of this statutory duty. But it was argued that sub-sect. 2 of sect. 583 makes a notice in writing a condition precedent to the bringing of an action either for a mandamus or for damages. It was said that the present case falls under sect. 583. Their Lordships think that it falls under sect. 586. But even so it may be contended that sub-sect. 2 of sect. 583 must be treated as applying also to sect. 586. Their Lordships are disposed to think that this view is probably correct, though singularly enough sect. 586 repeats sub-sect. 3 of sect. 583 and does not repeat sub-sect. 2.

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Sub-sect. 2 of sect. 583 is in these terms:—

"Any such municipality neglecting or refusing so to do upon reasonable notice in writing being given by any person interested therein, and who is injuriously affected by such neglect or refusal, may be compellable by mandamus to be issued by any Court of competent jurisdiction, to make from time to time the necessary repairs to preserve and maintain the same, and shall be liable for pecuniary damage to any person who or whose property is affected by reason of such neglect or refusal."

It seems to their Lordships most reasonable that no action should be brought for a mandamus to compel a municipality to execute repairs until after notice in writing has been given to them. But it would be very unreasonable to enact that a municipality is bound to repair all drainage works within its limits, and at the same time to say that a municipality is not to be liable for any breach of that statutory duty, however gross the breach may be, unless previous notice in writing is given. Damage by floods for the most part is sudden and unexpected. A man's property may be entirely ruined before it is possible for him to give any notice to the municipality, and yet if the contention of the appellants is correct he would be left without remedy; for there is no provision for arbitration in the statute relating to such a case. There are two arbitration clauses in the Municipal Act providing for compensation to lands injuriously affected (sects. 483 and 591). But sect. 483 only applies to damages "necessarily resulting" from the exercise of the municipality's statutory powers. And sect. 591 applies to damages alleged to have been done "in the construction of drainage works or consequent thereon."

It seems to their Lordships that the reference to damages in sub-sect. 2 of sect. 583 was probably inserted in order to preserve the right of the applicant to damages during the currency of the notice and the construction of the required repairs, and to negative the possible contention that his remedy against the municipality would be exhausted by obtaining a mandamus.

However this may be, their Lordships do not think that the language of sub-sect. 2 of sect. 583 is so clear as to take away the right to bring an action for damages without notice—a right to which a person injured as the plaintiffs in this case have been injured would primâ facie be entitled. So far therefore as relates to the damage occasioned by the overflow which might have been prevented if Government drain No. 1 and its embankment had been preserved, maintained, and kept in repair, their Lordships are of opinion that the plaintiffs are entitled to maintain the action, and they do not think that this right is prejudiced or affected by the fact that the municipality have poured into Government drain No. 1 excessive quantities of water by means of other drains constructed under by-laws duly passed. It may be, and perhaps it ought to be, inferred from the referee's report that there was at times some overflow from the latter cause, which, even if the drain and embankment had been preserved, maintained, and kept in repair, would not have been prevented. But this in their Lordships' opinion can make no difference as to the duty of the corporation to keep the drain in such a state as to carry off in relief of the plaintiffs' land all the water which it was capable of carrying off as originally constructed, nor as to the plaintiffs' remedy by action for the damage which (as the report expressly finds) was caused by the non-performance of that duty. It is not necessary to determine the question whether the municipality under the circumstances are bound to deepen or widen Government drain No. 1 in accordance with sub-sect. 3 of sect. 583.

The case as to the Bell drain stands on a very different footing.

The finding of the referee as regards the Bell drain is in these words:—

"I do further find and report, that by the construction of the Bell drain by the defendants in the year 1884, and particularly by the construction of an embankment on the westerly side thereof (and I find the construction of the said embankment to have been a part of the plan of the said Bell drain), a large body of water was brought down to the drain known as the Raleigh Plains drain that would not otherwise have come there, and that the Raleigh Plains drain was thereby overcharged with water, and that in time of high water every year for the past five years (except the year 1888), and in some of these years several times in the year, the water thus brought down has flowed on to and over the plaintiffs' land, or by raising the general level of the water has caused other waters to flow on to or over the plaintiffs' said land, that would not otherwise have gone there, and the plaintiffs' said land and crops have thereby been injured and damaged every year for the past five years (except the year 1888)."

It appears that the Bell drain was constructed under a by-law duly passed. It was therefore constructed under the statutory powers of the municipality, and not the less so because it has in the result injuriously affected the lands of the plaintiffs. The statute itself clearly contemplates that a drainage work which benefits certain lands may injuriously affect others. For any damage "necessarily resulting" from the exercise of the statutory powers of the municipality (sect. 483), and for any damages done to the plaintiffs' property "in the construction of drainage works or consequent thereon" (sect. 591), the plaintiffs must seek their remedy by arbitration. So far the action is incompetent.

It was argued on behalf of the respondents that if a drainage work constructed under a by-law duly passed turns out in the result not to answer its purpose by reason of the insufficiency of the outlet, or by reason of some other defect which a competent engineer ought to have foreseen and guarded against, or if the result of a drainage work is to damage a person's land by throwing water upon it which would not otherwise have come there—that is actionable negligence on the part of the municipality. This argument in their Lordships' opinion is wholly untenable. On the other hand, their Lordships do not agree with the argument of the appellants that municipalities are helpless instruments in the hands of the engineers they employ. They cannot indeed modify the engineer's plan themselves. That is no part of their business. But they may return the plan for amendment if they think that it is not desirable in the shape submitted to them. If, however, acting in good faith, they accept the engineer's plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute.

Their Lordships regret that they are unable to affirm the judgment of the Supreme Court in all respects, because they cannot help seeing that the plaintiffs have been seriously injured by the construction of the Bell drain, as well as by the breach of the statutory duty imposed upon the municipality. As far as the evidence goes there is no reason to suppose that the municipality would have been able to cut down the damages if the respondents had proceeded by arbitration. There is nothing whatever to suggest that the lands of the plaintiffs have been benefited in the slightest degree by the Bell drain. And although their Lordships are of opinion that the appellants have not waived their right to insist upon arbitration as regards the Bell drain, they think that the appellants ought to have insisted upon the question as to the competency of the action being determined before the matters in dispute were referred to the county court judge.

In the result their Lordships will humbly advise Her Majesty that the order of the Supreme Court ought to be discharged, except as to costs (with which their Lordships do not propose to interfere), and that the order of the Court of Appeal and the judgment of Ferguson, J., ought also to be discharged, and that it should be referred back to the county court judge to determine the amount of damages occasioned by the overflow from Government drain No. 1, and that the action as regards the Bell drain ought to be dismissed without prejudice to any claim on the part of the respondents, to have the amount of the damages to their property occasioned by the construction of the Bell drain and consequent thereon determined by arbitration, and that the further consideration of the action should be reserved.

There will be no costs of this appeal.

Solicitors for appellant: *Poole & Robinson.*

Solicitors for respondents: *Norton, Rose, Norton & Co.*

[PRIVY COUNCIL.]

J. C.*
1893
July 4, 29.

HARVEY AND ANOTHER . . . . PLAINTIFFS;

AND

FACEY AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Contract—Negotiation by Telegram—Incompleteness—Acceptance of offer not proved.

Where the appellants telegraphed, "Will you sell us B. H. P? Telegraph lowest cash price," and the respondent telegraphed in reply, "Lowest price for B. H. P. £900," and then the appellants telegraphed, "We agree to buy B. H. P. for £900 asked by you. Please send us your title-deed in order that we may get early possession," but received no reply:—

Held, that there was no contract. The final telegram was not the acceptance of an offer to sell, for none had been made. It was itself an offer to buy, the acceptance to which must be expressed and could not be implied.

APPEAL from a decree of the Supreme Court (June 18, 1892) setting aside a decree of Curran, J. (February 8, 1892), which dismissed the suit, which was one for specific performance of an alleged contract in writing.

The facts are stated in the judgment of their Lordships.

The respondents, Facey and his wife, denied the contract, and pleaded sect. 4 of the Statute of Frauds.

The question decided in appeal was whether the three telegrams set out in the pleadings constituted a binding agreement of sale and purchase.

The way in which the appeal came before their Lordships was, that on the 5th of July, 1892, the Supreme Court gave leave to appeal against so much of the decree as was based on L. M. Facey's want of authority to sell. On the 15th of March, 1893, special leave was granted by Her Majesty to appeal in respect of the damages awarded, but at the same time liberty was given to the respondents to contest the contract.

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and LORD SHAND.

Sir *Horace Davey*, Q.C., and *F. Safford*, contended that they did, being in themselves a memorandum of contract sufficient to satisfy the statute. Facey's telegraphic form contained his signature, and he had authority to make it; and the telegram received by the appellants, which contained the names of the sender and receiver written by the telegraph clerk in the ordinary course of his business, constituted a sufficient signature within the meaning of the statute. Assuming the telegrams and telegraphic forms to be sufficient to satisfy the statute, they contended that the Court of Appeal was right in holding that they proved a binding agreement. As regards the power of L. M. Facey to sell, the property had been purchased with his money, and the wife was mere trustee for the husband, who had always acted as owner and had power to bind his wife's interest (if any), or at least to bind his own. They contended that so much of the decree as declared the telegrams constituted a binding contract should be affirmed, and that it should be held that the Mayor and Council of Kingston bought subject to the said contract in its entirety, or so far as it was enforceable.

Farwell, Q.C., and *Stewart Smith*, for the respondents, in pursuance of leave reserved, contended that the judgment of Curran, J., should be restored, and the judgment of the Appeal Court discharged. Apart from the question of L. M. Facey's authority to sell, the claim under the circumstances to specific performance, and the effect of the Statute of Frauds, the initial difficulty in the case was that the telegrams on the face of them did not disclose a completed contract.

F. Safford, replied.

The judgment of their Lordships was delivered by

1893
July 29.

LORD MORRIS :—

The appellants instituted an action against the respondents to obtain specific performance of an agreement alleged to have been entered into by the respondent Larchin M. Facey for the sale of a property named Bumper Hall Pen. The respondent L. M. Facey was alleged to have had power and authority to bind his wife the respondent Adelaide Facey in selling the property. The appellants also sought an injunction against the Mayor and Council of Kingston to restrain them from taking a conveyance of the property from L. M. Facey.

The case came on for hearing before Mr. Justice Curran who dismissed the action with costs, on the ground that the agreement alleged by the appellants did not disclose a concluded contract for the sale and purchase of the property. The Court of Appeal reversed the judgment of Curran, J., and declared that a binding agreement for the sale and purchase of the property had been proved as between the appellants and the respondent L. M. Facey, but that the appellants had failed to establish that the said L. M. Facey had power to sell the said property without the concurrence of his wife the said Adelaide Facey, or that she had authorized him to enter into the agreement relied on by the appellants, and that the agreement could not therefore be specifically performed, and the Court ordered that the appellants should have forty shillings for damages against L. M. Facey in respect of the breach of the agreement, with costs in both Courts against L. M. Facey in respect of the breach of the agreement.

The appellants obtained leave from the Supreme Court to appeal to Her Majesty in Council, and afterwards obtained special leave from Her Majesty in Council to appeal in respect of a point not included in the leave granted by the Supreme Court, but the Order in Council provided that the respondents should be at liberty at the hearing, without special leave to contest the contract alleged in the pleadings and affirmed by the Court of Appeal.

The appellants are solicitors carrying on business in partnership at Kingston, and it appears that in the beginning of October, 1891, negotiations took place between the respondent L. M. Facey and the Mayor and Council of Kingston for the sale of the property in question, that Facey had offered to sell it to them for the sum of £900, that the offer was discussed by the council at their meeting on the 6th of October, 1891, and the consideration of its acceptance deferred; that on the 7th of October, 1891, L. M. Facey was travelling in the train from Kingston to Porus, and that the appellants caused a telegram to be sent after him from Kingston addressed to him "on the train for Porus," in the following words: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price—answer paid;" that on the same day L. M. Facey replied by telegram to the appellants in the following words: "Lowest price for Bumper Hall Pen £900"; that on the same day the appellants replied to the last-mentioned telegram by a telegram addressed to L. M. Facey "on train at Porus" in the words following: "We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you. Please send us your title deed in order that we may get early possession." The above telegrams were duly received by the appellants and by L. M. Facey. In the view their Lordships take of this case it becomes unnecessary to consider several of the defences put forward on the part of the respondents, as their Lordships concur in the judgment of Mr. Justice Curran that there was no concluded contract between the appellants and L. M. Facey to be collected from the aforesaid telegrams. The first telegram asks two questions. The first question is as to the willingness of L. M. Facey to sell to the appellants; the second question asks the lowest price, and the word "Telegraph" is in its collocation addressed to that second question only. L. M. Facey replied to the second question only, and gives his lowest price. The third telegram from the appellants treats the answer of L. M. Facey stating his lowest price as an unconditional offer to sell to them at the price named. Their Lordships cannot treat the telegram from L. M. Facey as binding him in any respect, except to the extent it does by its terms, viz., the lowest price. Everything else is left open, and the reply telegram from the appellants cannot be treated as an acceptance of an offer to sell to them; it is an offer that required to be accepted by L. M. Facey. The contract could only be completed if L. M. Facey had accepted the appellant's last telegram. It has been contended for the appellants that L. M. Facey's telegram should be read as saying "yes" to the first question put in the appellants' telegram, but there is nothing to support that contention. L. M. Facey's telegram gives a precise answer to a precise question, viz., the price. The contract must appear by the telegrams, whereas the appellants are obliged to contend that an acceptance of the first question is to be implied. Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry. Their Lordships will therefore humbly advise Her Majesty that the judgment of the Supreme Court should be reversed and the judgment of Curran, J., restored. The appellants must pay to the respondents the costs of the appeal to the Supreme Court and of this appeal.

Solicitors for appellants: *Tippetts & Son.*
Solicitors for respondents: *Worthington, Evans & Son.*

[PRIVY COUNCIL.]

J. C.*
1893
July 3, 22.

SOLLING AND ANOTHER . . . . PLAINTIFFS;

AND

BROUGHTON . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Real Property Act, 26 *Vict. No.* 9—41 *Vict. No.* 18 *—Onus Probandi as between Applicant and Caveators in Possession.*

Where the respondent applied to bring land under the provisions of the Real Property Act (26 Vict. No. 9) amended by 41 Vict. No. 18, and shewed a complete documentary title, and that he was in possession within twenty years before such application :—

Held, that the onus was on the appellants, who were caveators in possession to shew that the applicant's title had been defeated—that is, that his entries on the land when vacant within the twenty years had been ineffective—in other words, had not been made animo possidendi, or had been made after his title had been extinguished.

APPEAL from an order of the Supreme Court (August 18, 1891), directing certain caveats entered by the appellants to be withdrawn with costs.

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* *Present* :—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

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The facts are stated in the judgment of their Lordships, and the case in the Court below is reported in 12 N. S. W. L. R. 189.

Finlay, Q.C., and *W. Graham*, for the appellants, contended that they ought to have been treated as defendants and not as plaintiffs in an action of ejectment, they being at the date of their application in possession of the lands in suit. The Supreme Court Judge was in error in deciding the case as though the appellants had relied only on a possessory title, for they had put forward in the alternative a documentary title, which should have been duly put in issue. The case for the appellants was that the respondent had been out of possession for more than twenty years, and that accordingly his title (if any) was extinguished. The entries found by the jury to have been made by the respondent on the lands during those years were mere entries within the meaning of 3 & 4 Will. 4, c. 27, s. 10, and were not made animo possidendi.

Reference was made to *Trustees, Executors, and Agency Company* v. *Short* (1); *Doe* v. *Barnard* (2); *Dixon* v. *Gayfere* (3); *Asher* v. *Whitlock* (4). [*Cozens-Hardy*, Q.C., referred to *Jenkins* v. *Jones* (5).]

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

1893
July 22.

LORD MACNAGHTEN:—

The question in this case relates to the title to a piece of land containing ten acres, situate at Gore's Wharf in the parish of Willoughby in the county of Cumberland. The proceedings commenced on the 2nd of November, 1887, with an application by the respondent Thomas Broughton to bring the land under the provisions of the Real Property Act, 26 Vict., No. 9, amended by 41 Vict., No. 18. The applicant's title was passed by the Examiners of Titles, and the usual notices were issued. On the

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(1) 13 App. Cas. 793.
(2) 13 Q. B. 945.
(3) 17 Beav. 431.
(4) Law Rep. 1 Q. B. 1.
(5) 9 Q. B. D. 128.

16th of November, 1889, the appellants who were in possession of the land at the time lodged caveats against the application. Cases were stated in pursuance of the Act by both parties, and in the result issues were settled which the Court directed to be tried before a jury between the caveators as plaintiffs and the applicant as defendant.

The applicant in his case shewed a complete documentary title, commencing with a Crown grant dated the 29th of September, 1838, to one William Gore in fee. The caveators relied on a possessory title, and alleged that the applicant had been out of possession for more than twenty years. An alternative case in which they put forward a documentary title was abandoned.

The trial took place before Sir William Windeyer, J., and a jury of four persons. It lasted six days. The learned judge summed up the case to the jury, who by the consent of both parties were not required to find a verdict on the specific issues. They found a special verdict on certain questions which were submitted to them, and the issues were reserved to be dealt with by the full Court.

The judgment of the full Court, of which Sir William Windeyer, J., was himself a member, was delivered by Sir Frederick Matthew Darley, C.J., on the 18th of August, 1891. The judgment states the material findings of the jury in the following terms:—

" In their answer to the second question the jury found that Broughton made an entry on the land in 1855 ; and reading this finding with the evidence given, it must be taken to mean an entry in June, 1855, upon the land when it was vacant and in the occupation of no one. Then, in answer to the third question, the jury found that Broughton made an entry when no one was in actual occupation between November, 1867, and November, 1887 ; and looking at this by the light of the evidence it plainly refers to an entry by Broughton in the year 1875 when he went there and found the place vacant and the house upon it empty."

Upon these findings, having regard to facts which were either admitted or proved, the Court was of opinion that the caveators had " failed to shew that for any period of twenty years they were in continuous possession " and concluded by stating that

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"the applicant must in both suits be declared to be the party finally successful and the caveats must be removed."

From this judgment and the orders consequential upon it the caveators have appealed.

Their first ground of complaint is that they ought not to have been made plaintiffs in the trial of the issues, but that they ought to have had such advantage as a defendant in possession has in an action for the recovery of land. In answer to this objection it would probably be sufficient to say that there was no appeal to the Full Court, and that there is no appeal to this board, from the order which directed the caveators to be plaintiffs. It is stated in the judgment under appeal that it has been held in New South Wales "that a Caveator in possession is not in the same position as a defendant in ejectment" and authority was cited in support of that view. Their Lordships do not desire to throw any doubt upon this proposition, which in itself does not seem unreasonable, or indeed to express any opinion upon it, as the point is not properly before them. But it may be observed that in the present case the caveators would have gained no advantage by being made defendants. The applicant comes forward and shews a complete documentary title, and proves that he was in possession within the period of twenty years before the commencement of the proceedings. Then the burden of proof is shifted: *Leigh* v. *Jack* (1), and it lies upon the caveators to shew that the applicant's original title has been defeated, or in other words that the entry in 1875 was not effective.

Then it was objected that the findings of the jury as to Broughton's entries on the land come to nothing. The Statute it was pointed out declares that no person shall be deemed to have been in possession of any land within the meaning of the Act "merely by reason of having made an entry thereon." That "evidently applies," as Lord Campbell observes in *Randall* v. *Stevens* (2), "to a mere entry, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time and pronouncing a few words, without any attempt or intention or wish to take possession." In the present

(1) 5 Ex. D. 264.

(2) 2 El. & Bl. 652.

case there is no ground for supposing that the findings of the jury, who must have had their minds directed to this question—the substantial question between the parties—were illusory and unmeaning. The entries must have been regarded by the jury as effective. They are so treated by the Court which included the learned Judge who presided at the trial. And if the evidence is to be looked at it is plain that these entries were made animo possidendi, and that on entering upon the land Broughton was in of his fee simple title, and that any other person there not having his license or authority would have been a mere trespasser.

Under these circumstances it was for the caveators to prove that Broughton's entry in 1875 was of no avail. That could only be done by shewing that Broughton's right and title had been previously extinguished. Now the facts are these:—William Gore mortgaged the land in fee in 1840. He died intestate in 1845, leaving his son William Bligh Gore his heir-at-law. In May 1855 the successor in title of the original mortgagees sold the land as he was entitled to do by the terms of the mortgage deed. The purchaser on that sale mortgaged the land in fee to Broughton on the 15th of June 1855, and Broughton purchased the equity of redemption in 1861. So long as the mortgage continued the possession of William Bligh Gore, the heir-at-law of the mortgagor, was not hostile to or inconsistent with the mortgagee's right. It was said that there was no proof that interest was ever paid on the mortgage. It was for the caveators to prove non-payment of interest, if that fact was supposed to be material. It could not really have been material, because no title could have been acquired under the Statute of Limitations between 1840, the date of the mortgage, and 1855 the date of the sale. If William Bligh Gore continued in possession after the sale, as it may be presumed he did, until Broughton's entry in the following June, he must either have been tenant at will or tenant at sufferance. Broughton it seems took William Bligh Gore with him when he made the entry in June 1855, and authorized him to remain in occupation. Whether William Bligh Gore in fact acted as Broughton's agent or not, from June 1855 he was tenant at will, and even if there had been continuous occupation from that date by William Bligh Gore and persons claiming under him without any acknowledgement of Broughton's title no title could have been acquired under the Statute of Limitations until June 1876, and it is found that Broughton entered again in 1875.

The same result may be reached, as it has been reached by the Full Court, on the shewing of the caveators themselves. They seek to set up a possessory title derived from one French who died in October 1875, and who was the husband of Mrs. French one of the appellants. But French did not enter until after the death of William Bligh Gore in 1863, and the appellants cannot connect French in title with William Bligh Gore. French was a nephew of William Bligh Gore, but he was neither his devisee nor his heir nor one of his next of kin. There must have been an interval between the death of William Bligh Gore and the entry of French. During that interval, whether William Bligh Gore was tenant at will or tenant at sufferance, the rightful owner on the determination of the tenancy by the death of the tenant must have been in of his fee simple title without the presence of any other person on the land who could carry on or initiate a claim hostile to or inconsistent with his right.

Under these circumstances the caveators cannot connect themselves with William Bligh Gore, and the authority of *Doe* v. *Barnard* (1), on which they seem to have relied in the Court below is really against them.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Henry Kimber & Co.*
Solicitors for respondent: *Want & Co.*

(1) 13 Q. B. 945.

[HOUSE OF LORDS.]

H. L. (E.)
1893
Sept. 8.

THE LONDON COUNTY COUNCIL . . APPELLANTS;

AND

THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF ERITH IN THE COUNTY OF KENT, AND THE ASSESSMENT COMMITTEE OF THE DARTFORD UNION. . . . RESPONDENTS.

THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF WEST HAM IN THE COUNTY OF ESSEX . . . . APPELLANTS;

AND

THE LONDON COUNTY COUNCIL . . RESPONDENTS.

THE ASSESSMENT COMMITTEE OF THE ST. GEORGE'S UNION IN THE COUNTY OF LONDON . . . . APPELLANTS;

AND

THE LONDON COUNTY COUNCIL . . RESPONDENTS.

Poor-rate—Rateable Value—Sewers, Sewage Works and Pumping Station, Rateability of—Beneficial Occupation—Annual Value—Hypothetical Tenant —6 & 7 *Will.* 4 *c.* 96 *s.* 1; 32 *&* 33 *Vict. c.* 67 *s.* 4.

The London County Council were owners of land and premises consisting of a pumping-station and works, which they occupied and used as a necessary part of the metropolitan sewage system and to enable them to perform statutory duties. So long as the land and premises were used as part of the sewage system they were incapable of yielding a profit and the London County Council were practically the only possible tenants. If the land and premises had been in the possession, not of the London County Council, but of a private owner to be let, the London County Council would have been willing to pay a yearly rent for the same as part of the metropolitan sewage system sufficient to support the rateable value at which they were assessed to the poor-rate; but except for the purposes of the sewage system and if the land and premises were disconnected therefrom and in the hands of a tenant applied to any other purpose for which they might be available, the rateable value would be lower.

Under similar conditions the London County Council were also owners of outfall sewers used for the discharge of the sewage into the Thames and constructed, not underground, but in an embankment erected upon land purchased for that purpose and previously rateable:—

Held, that the true test of beneficial occupation was not whether a profit could be made but whether the occupation was of value;

That even supposing the London County Council could not under the statutes legally be tenants they ought to be taken into account as possible hypothetical tenants, for the purpose of determining the rateable value of the premises which they owned and occupied;

That the pumping-station and works and the outfall sewers were rateable to the poor-rate and that the London County Council were assessed on the true principle;

The decisions of the Court of Appeal ([1892] 2 Q. B. 44, and [1893] 1 Q. B. 210) reversed and the decisions of the Queen's Bench Division restored.

The decisions of the Court of Appeal in *Reg.* v. *School Board for London* (17 Q. B. D. 738) and *Burton-on-Trent Corporation* v. *Churchwardens &c. of Egginton* (24 Q. B. D. 197) approved; and the decision in *Owens College* v. *Overseers of Chorlton-upon-Medlock* (18 Q. B. D. 403) disapproved.

THESE three appeals were argued at different dates and in the order in which they are named above.

ERITH CASE.

In the first appeal, the Erith case, the West Kent Quarter Sessions, on an appeal by the London County Council against a poor-rate made for the parish of Erith wherein they were rated as owners of certain outfall works, decided by consent that the net rateable value should be reduced from £12,000 to £10,000, but that the gross estimated rental should remain at £15,000, subject to the following special case:—

1. The London County Council (the appellants) are the governing body of the administrative county of London, and are, by virtue of the provisions of the 51 & 52 Vict. c. 41, the successors to the Metropolitan Board of Works, and are the present owners of the outfall works, pumping-station and appurtenances, the subject-matter of this appeal. The appellants have to discharge all the duties of the Metropolitan Board of Works in reference to the drainage of the metropolis.

2. The parish of Erith is situate in the county of Kent and outside the jurisdiction of the appellants.

3. Pursuant to powers and duties contained in the various

Acts passed for the better government and drainage of the metropolis, and known as the Metropolis Management Acts 1855, 1858 and 1862, the Metropolitan Board of Works designed and constructed a system of drainage for the metropolitan area. Under this system, sewers and pumping-stations were constructed by means whereof the sewage for that part of the metropolitan area which is situated south of the Thames is conveyed to Crossness, which is situate in the parish of Erith, and on the banks of the river Thames.

4. In order to enable the sewage so conveyed to Crossness to be discharged into the river Thames, the Metropolitan Board of Works purchased 37A. 2R. 0P. of land on the bank of the river Thames, and on such land constructed the outfall works, pumping-station and appurtenances which have been rated to the said poor-rate.

5. In order to enable the sewage to be raised from the sewers in which it had been conveyed to Crossness to a level sufficiently high to enable the sewage to be discharged into the river Thames, it was necessary to construct a pumping-station with all the necessary machinery to pump the said sewage into a large reservoir. After the said sewage has been pumped into the said reservoir, 16,000,000 gallons per day are chemically treated, and the sludge is separated from the effluent water. The sludge, after being removed from the said reservoir, is taken in steam vessels and discharged beyond the mouth of the Thames into the Barrow Deep, whilst the effluent water is discharged from the said reservoir into the river Thames, and four-fifths, or the greater portion of the sewage, is discharged in a crude state.

6. The machinery, works and pumping-station were specially designed and constructed for the work which they have to do in connection with the metropolitan main drainage system, of which they form an essential integral part.

7. The land, pumping-station and works were and are suitable and necessary to enable the appellants to discharge their statutable duty under the said Acts and to dispose of the sewage, and are held, occupied and used by the appellants in the manner and solely for the purposes herein set forth.

8. It is impossible to work the outfall works except at a loss,

and the land and pumping-station, whilst used as part of the sewage system, are incapable of yielding a profit.

9. By the provisions of 18 & 19 Vict. c. 120 s. 150 and 21 & 22 Vict. c. 104 s. 3 the Metropolitan Board were, and the appellants are now, authorized either to purchase or to take on lease land for the purposes therein mentioned, and they have power by 18 & 19 Vict. c. 120 s. 154 to dispose by sale of the property so acquired.

10. It is agreed that if the land, outfall works and pumping-station in question were not in the possession of the appellants but in the hands of a private owner, and connected with the metropolitan sewage system, to be let to the appellants as tenants, they would be willing to pay a yearly rent for the same for the purposes of being used as part of and in connection with the metropolitan sewage system, sufficient to support the gross and net rateable value as fixed by the quarter sessions as hereinbefore mentioned; but that except for the purposes of the metropolitan sewage system, and if the said works and premises were disconnected therefrom and in the hands of a tenant applied to any other use or purpose they might be available for, the rateable value of the land and premises would be £2678 gross and £2143 net rateable value; and prior to the making of the present rate the appellants had been assessed for many years in respect of the said works and premises on such last-mentioned figures.

11. The appellants contend that the said works, pumping-station and premises being only capable of beneficial occupation if used for other than the said sewage purposes should be rated at the value for which the same would let to a hypothetical tenant from year to year, supposing the said works, pumping-station and premises were not used as part of the said sewage system but were entirely disconnected therefrom and applied to any other use or purpose for which they could be made available, and that the appellants should be rated according to the rule laid down by the Court of Queen's Bench in *Metropolitan Board of Works* v. *Churchwardens and Overseers of the Parish of West Ham* (1).

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(1) Law Rep. 6 Q. B. 193; 40 L. J. (M.C.) 30.

12. The respondents contend that as the appellants would have been willing to pay a rent for the said works, pumping-station and premises if they had not been the owners, they must be taken into account as hypothetical tenants from year to year in order to ascertain the rateable value of the said premises, and that the rule as laid down in the *Burton-on-Trent Corporation* v. *Churchwardens and Overseers of the Parish of Egginton* (1) governs this case.

If the Court should be of opinion that the contention of the appellants is correct, then the order of quarter sessions is to be quashed.

If the Court should be of opinion that the contention of the respondents is correct, then the order of quarter sessions is to be confirmed.

[During the argument of the appeal in this House by permission of the House and by consent the following words were added to the case:—

"If the Court should be of opinion that the premises are not rateable, then the order of quarter sessions is to be quashed."]

The Queen's Bench Division affirmed the order of quarter sessions, and this decision was affirmed by the Court of Appeal (2).

Feb. 23, 27, 28; March, 2, 3. Sir *E. Clarke* Q.C. and *Bosanquet* Q.C. (*Avory* with them) for the appellants:—

The questions are, whether the pumping-station and works are rateable at all; and if so whether the appellants are to be considered as possible hypothetical tenants. The case of *Burton-on-Trent Corporation* v. *Churchwardens and Overseers of the Parish of Egginton* (3) was that of a sewage farm, and is not applicable to the present case. But in *London County Council* v. *St. George's Union* (4), now in course of appeal to this House, deodorizing works were held not to be rateable. In *Reg.* v. *Metropolitan Board of Works* (5) sewers were held not to be rateable because they did not admit of a beneficial occupation.

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(1) 24 Q. B. D. 197; 59 L. J. (M.C.) 1.

(2) Not reported below, but referred to during the argument in the *St. George's Case* in the Court of Appeal [1893] 1 Q. B. at p. 219.

(3) 24 Q. B. D. 197.

(4) [1893] 1 Q. B. 210.

(5) Law Rep. 4 Q. B. 15.

H. L. (E.)
1893

London County Council v. Churchwardens &c. of Parish of Erith and Assessment Committee of Dartford Union.

Churchwardens &c. of Parish of West Ham. v. London County Council.

Assessment Committee of St. George's Union. v. London County Council.

In *London County Council* v. *Woolwich Union* (1) pumping-stations were held not to be rateable. In that case the Court held that the machinery and works were to be assessed as if they were disconnected from the sewage system and used for another purpose. No tenant would take such premises, and the county council is by statute precluded from being tenant at all. There are two theories of rating; one is that you must regard the property only, and if it is incapable in any circumstances of yielding profit there will be no assessment; the other that if it is so incapable in the hands of the existing owners there will be no assessment. Sometimes works in one parish improve property in another; thus in *R.* v. *Churchwardens &c. of Sculcoates* (2) drainage works in Sculcoates benefiting other parishes were held by Lord Ellenborough C.J. not to be rateable in Sculcoates. If the property is used for purposes of trade or business—e.g. baths and washhouses—and would command a rent from a private person, it is rateable accordingly. So in *Jones* v. *Mersey Docks and Harbour Board* (3) the dock trustees were held to be in "beneficial occupation," as the charges made on shipping were in excess of the cost of maintaining the docks. Blackburn J. and the majority of the judges held that the dock trustees were "occupiers" within the 43 Eliz. Byles J. thought they were not; but all the judges agreed that the principle of assessment was what a tenant would pay.

In *Mayor of Lincoln* v. *Overseers of Holmes Common* (4), per Blackburn J., this principle is clearly laid down. In *Corporation of Worcester* v. *Droitwich Poor Law Union* (5) the local board did not make so much profit by their waterworks as a private trader would, but they were held assessable only at the rateable value which was based upon the profit actually earned, as they were precluded by their Act from making rates more than sufficient to maintain the works; and see *Mayor of Liverpool* v. *Overseers of Wavertree*, reported at p. 55 in a note to that case. In *New Shoreham Harbour Commissioners* v. *Overseers of Lancing* (6) the harbour commissioners were held not rateable at all in respect of harbour piers. In *Metropolitan Board of Works* v. *Overseers of West Ham* (1) the sewers were held not rateable; but the works were held rateable at the value for which they would let to an ordinary tenant if disconnected from the sewers. If no tenant would take them so disconnected, they would be rated at nothing: *Reg* v. *Metropolitan Board of Works* (2); *Hare* v. *Churchwardens of Putney* (3). The distinction between property itself "struck with sterility," which is prevented from being remunerative by the purpose to which it is put, and property which is unprofitable in the hands of its occupiers, is explained in *Overseers of Chorlton* v. *Guardians of Chorlton* (4) and *Corporation of Peterborough* v. *Stamford Union* (5). The principle which reconciles the cases is that competitive value is the usual basis; but where there are statutory limitations you cannot exclude them from consideration. This property cannot be profitable to the county council or to any one else. In *West Bromwich School Board* v. *Overseers of West Bromwich* (6) the school board was held rateable because the property would be valuable in other hands. Mathew J. disapproved the *Peterborough Case* (5); but he expresses the principle that you cannot have a hypothetical tenant when the only possible tenant is the statutory tenant who can make no profit. Bowen L.J. said there could be no rating where the land was "by law struck with sterility." In *Mersey Docks and Harbour Board* v. *Overseers of Llaneilian* (7) a lighthouse was held not rateable; but the dwelling-houses used by the light-keepers were rateable. In *Reg.* v. *School Board for London* (8) Lord Esher M.R. said the question was not what *the* tenant would give, but what *a* tenant—not excluding the actual occupier—would give from year to year. That case was not intended to interfere with the old decisions, or with the *Metropolitan Board of Works* v. *West Ham* (1). In *Owens College* v. *Chorlton-upon-Medlock* (9) the trustees of the college were held not to be possible tenants. The true principle is laid down in *London County Council* v.

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(1) [1893] 1 Q. B. 210.
(2) 12 East, 40.
(3) 11 H. L. C. 443.
(4) Law Rep. 2 Q. B. 482.
(5) 2 Ex. D. 49.
(6) Law Rep. 5 Q. B. 489.

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(1) Law Rep. 6 Q. B. 193.
(2) Law Rep. 4 Q. B. 15.
(3) 7 Q. B. D. 223.
(4) 51 L. J. (Q.B.) 458.
(5) 31 W. R. 949.
(6) 13 Q. B. D. 929.
(7) 14 Q. B. D. 770.
(8) 17 Q. B. D. 738.
(9) 18 Q. B. D. 403.

West Ham (1) in which *Reg.* v. *Metropolitan Board of Works* (2) and *Metropolitan Board of Works* v. *West Ham* (3) were followed.

Balfour Browne Q.C. and *Macleod Fullarton Q.C.* (*Morton W. Smith* with them) for the respondents:—

There is much conflict in the decisions, and it is desired on both sides that the House should establish a general principle. The rent a man actually gives is evidence of what "may reasonably be expected," and the rent a man probably would give is also evidence. Profit is not the only consideration: it is not present at all in the case of a private residence; and the introduction of "profit" and "loss" has really confused the question. A property is rateable if it can be let, if the property is "beneficial" as distinguished from "profitable." It is undoubtedly beneficial to get rid of the sewage. The case is governed by *Jones* v. *Mersey Docks and Harbour Board* (4). No doubt regard must be had to the statutory restrictions; but the privileges must also be borne in mind. The county council will after so many years become absolute owners of these sewage works which they are buying at the ratepayers' cost. In *Reg.* v. *West Middlesex Waterworks Company* (5) water mains were held rateable and they are not more valuable than sewage works. In *Dewsbury Waterworks Board* v. *Penistone Union* (6) the amount collected as water rate was taken into consideration. By the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120) ss. 135 and 150 the main sewers were vested in the Board of Works, to whom power was given to construct works and sell or dispose of the sewage in such a way as not to create a nuisance, and also to purchase or take on lease any land or easement or right over land which might be necessary for the construction or formation of works. The terms "profitable" and "beneficial" are often confused, although they were clearly distinguished by Lord Denman C.J. in *Governors of Bristol Poor* v. *Wait* (7). The parish of Erith ought not to suffer because the county council owns the sewers instead of renting them. The Public Health Act 1875 (38 & 39 Vict. c. 55), s. 27 contemplates that all local authorities shall have power either to purchase or take on lease. In the *Mayor &c. of London as Governors of St. Thomas's Hospital* v. *Stratton* (1) the hospital was held rateable and Lord Chelmsford expressed the principle to be that property of which the beneficial occupation was applicable solely to purposes, whether public or otherwise, from which the occupiers received no personal benefit was rateable. *Jones* v. *Mersey Docks and Harbour Board* (2) was held to apply. The real question is what would the county council or other statutory body give for suitable works and appliances if the whole sewage system were vacant. In *Greig* v. *University of Edinburgh* (3) the property of the university not being held by or for the Crown was held subject to poor-rate. The doctrine of Crown exemption is not extended to all public bodies. If there were no sewage system the householders would pay to have the sewage removed. In the West Ham case it was said that three millions had been spent on the sewers. Interest is paid on that money, and that interest represents the assessable value. In *Owens College* v. *Chorlton-upon-Medlock* (4) the college could not make any profit, but was held rateable. Profit is in fact never rated at all: from gross returns a reasonable profit for the trader, in the case of business premises, is eliminated, and so the rent which he would be willing to pay is arrived at for the purpose of assessment. In the *Dewsbury Case* (5) the rate levied to make up an insufficient water rate was considered as part of the revenue. In the case suggested of a lighthouse rates would be levied, as a harbour authority would be willing to pay rent for a lighthouse erected at the entrance to a port. In a water undertaking there may be reservoirs in one parish, pumping apparatus in another. The principle of rating in such cases is laid down in *Reg.* v. *West Middlesex Waterworks Company* (6) viz. as for so much land and buildings with fixtures and machinery attached. In the case of a water company some value was to be added from the capacity of the land and buildings to serve the purposes of the company. In the case of railways the construction-value or the rent which would be paid for the premises and not the amount of profits earned is the only test: *Reg.* v. *Grand Junction Railway Company* (1); *Reg.* v. *Eastern Counties Railway Company* (2).

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(1) [1892] 2 Q. B. 44.
(2) Law Rep. 4 Q. B. 15.
(3) Law Rep. 6 Q. B. 193.
(4) 11 H. L. C. 443.
(5) 1 E. & E. 716; 28 L. J. (M.C.) 135.
(6) 17 Q. B. D. 384.
(7) 5 A. & E. 1, 8.

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(1) 45 L. J. (M.C.) 23.
(2) 11 H. L. C. 443.
(3) Law Rep. 1 H. L., Sc. 348.
(4) 18 Q. B. D. 403.
(5) 17 Q. B. D. 384.
(6) 1 E. & E. 716; 28 L. J. (M.C.) 135.

Bosanquet Q.C. in reply.

The House took time for consideration.

WEST HAM CASE.

In the second appeal, the West Ham case, the London County Council had appealed against a poor-rate made for the parish of West Ham, wherein they were rated as occupiers of certain hereditaments described as pumping-station, land and premises situate in the parish, at a sum of £6227 as the gross estimated rental and £4982 as the rateable value, and as occupiers of certain other hereditaments described as outfall mains situate in the parish at a sum of £13,781 gross estimated rental and £11,026 as the rateable value. The Essex Quarter Sessions dismissed the appeal subject to the following special case:—

1. The London County Council are the governing body of the administrative county of London and are by virtue of the provisions of 51 & 52 Vict. c. 41 the successors to the Metropolitan Board of Works, and are the present owners of the outfall mains or sewers, pumping-station and other premises the subject-matter of this appeal. The London County Council have to discharge all the duties of the Metropolitan Board of Works in reference to the drainage of the metropolis.

2. Pursuant to powers and duties contained in the various Acts passed for the better government and drainage of the metropolis and known as the Metropolis Management Acts 1855, 1858 and 1862, the Metropolitan Board of Works designed and constructed a system of drainage for the metropolitan area. Under the said system sewers and the pumping-station in question, known as the Abbey Mills Pumping Station, were constructed, by means of

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(1) 4 Q. B. 18.

(2) 32 L. J. (M.C.) 174.

which the sewage is lifted from a lower to a higher level for the purpose of being conveyed by what is called the Northern Outfall Sewer to the Barking Outfall Works and then discharged into the river Thames.

3. In order to enable the sewage from that part of the metropolitan area which is drained by the northern low-level sewer to be raised to a higher level for the purpose of being discharged into the river Thames, it was necessary to construct a pumping-station with the necessary machinery, and for this purpose the Metropolitan Board of Works purchased about seven and a half acres of land in the said parish and constructed thereon the pumping-station in question with all the necessary machinery and works. So much of the said outfall mains or sewers as are situate in the said parish are constructed in an embankment upon land purchased by the Metropolitan Board of Works for such purpose and occupying in all about thirty-seven acres.

4. The said sewers, machinery, works and pumping-station were specially designed and constructed for the work which they have to do in connection with and for the purposes of the metropolitan main drainage system, of which they form an essential integral part.

5. The said land, sewers, pumping-station and works were and are suitable and necessary to enable the London County Council to discharge their statutable duties under the said Acts and to dispose of the sewage, and are held, occupied and used by them in the manner and solely for the purposes herein set forth.

6. The said land, sewers, pumping-station and works whilst used as part of the metropolitan sewage system are incapable of yielding a profit and cannot be worked except at a loss.

7. By the provisions of 18 & 19 Vict. c. 120 s. 150 and 21 & 22 Vict. c. 104 s. 3 the Metropolitan Board of Works were and the London County Council are now authorized to purchase or take on lease land for the purposes therein mentioned, and they are empowered by 18 & 19 Vict. c. 120 s. 154 to dispose by sale of the property so acquired.

8. It is agreed that if the land, sewers, pumping-station and works in question were not in the possession of the London County Council but in the hands of a private owner and con-

nected with the metropolitan sewage system, to be let to the Council as tenants, they would be willing to pay a yearly rent for the same, for the purpose of being used as part of and in connection with the metropolitan sewage system, sufficient to support the gross and rateable values of the said hereditaments as determined by the quarter sessions as hereinbefore mentioned; and it was found as a fact by the quarter sessions that except for the purposes of the metropolitan sewage system, and if the said land, pumping-station and works were disconnected therefrom and in the hands of a tenant applied to any other use or purpose for which they might be available, the gross estimated rental of the said land, pumping-station and works (exclusive of sewers) was £3125, and the rateable value £2500.

9. The London County Council contend that the said sewers and embankment ought not to be included in the rating on the ground that they are not capable of a beneficial occupation, and in support of this contention they rely among other things upon the provisions of sect. 45 of the West Ham Corporation (Improvements) Act 1888 (51 & 52 Vict. c. clxxix.); and further they contend that so much of their property as is liable to be rated to the relief of the poor should be rated at the value for which the same would let to a hypothetical tenant from year to year, supposing it was not used for the purpose of the metropolitan sewage system but was entirely disconnected therefrom and applied to any other use or purpose for which it could be made available by a tenant thereof, according to the rule laid down in *Metropolitan Board of Works* v. *Churchwardens and Overseers of West Ham.* (1)

10. The churchwardens &c. of West Ham contend that it is not necessary to rateability that the premises as actually occupied and utilized should yield or be capable of yielding a commercial profit, but that it is sufficient if they could be let and would command a rent from any possible hypothetical tenant from year to year; that the London County Council ought to be taken into account as one of the possible hypothetical tenants from year to year; that the rule as laid down in the *Burton-on-Trent Corporation* v. *Churchwardens and Overseers of the Parish*

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(1) Law Rep. 6 Q. B. 193.

of Egginton (1) governs this case, and that the present rate is right.

If the Court should be of opinion that the contention of the London County Council is correct, then the order of quarter sessions is to be quashed.

If the Court should be of opinion that the contention of the churchwardens &c. is correct, then the order of the quarter sessions is to be confirmed.

The Queen's Bench Division (Lawrance and Wright JJ.) affirmed the order of quarter sessions. The Court of Appeal (Lord Esher M.R., Fry and Lopes L.JJ.) reversed the decision of the Queen's Bench Division as to the rateability of the sewers, holding that they were not rateable, and quashed the order of quarter sessions: the question as to the pumping station, land and premises being withdrawn from the Court of Appeal (2).

March 3. *R. T. Reid Q.C.* and *John Montefiore* (Sir *R. Webster Q.C.* with them) for the appellants:—

The owner must be considered as one of the hypothetical tenants, and the problem is to find out what would be a fair rental for the premises. "Beneficial" occupation means an occupation for which the tenant would be willing to pay. It is not the same as profitable. The Local Government Act 1888 (s. 40 sub-s. 8 and s. 65) makes the county council the successor of the Metropolitan Board, but confers powers upon it which were not enjoyed by its predecessor. [They also referred to *London County Council* v. *Woolwich Union* (3), and to the arguments in the first appeal.]

Bosanquet Q.C. (Sir *E. Clarke Q.C.* and *Avory* with him) also referred to the arguments which they had used in the Erith case, and pointed out that if sewers were now held rateable for the first time, the decision would have a very wide and far-reaching effect.

The House took time for consideration.

ST. GEORGE'S CASE.

In the third appeal, the St. George's case, the London County Council had appealed against the valuation list for the parish of St. George, Hanover Square, wherein they were assessed in respect of land, buildings, pumping-station, machinery &c. situate in Grosvenor Road in the said parish, and whereof they were the owners and occupiers, at £5858 as the gross value, and £3994 as the rateable value.

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(1) 24 Q. B. D. 197.

(2) [1892] 2 Q. B. 44.

(3) [1893] 1 Q. B. 210.

The Court of Quarter Sessions for the County of London dismissed the appeal subject to the following special case:—

1. The London County Council are the county council for the administrative county of London under the provisions of the Local Government Act 1888, and are under that Act the successors of the Metropolitan Board of Works and are the owners and occupiers of the land, buildings and pumping-station and the works and machinery thereon and connected therewith, the subject-matter of this appeal.

2. Under the Metropolis Local Management Act 1855 and the Acts amending the same the late Metropolitan Board of Works designed and constructed the metropolitan main drainage and intercepting scheme for the purpose of the drainage of the metropolis. The lands the subject-matter of this appeal were purchased and acquired by the Metropolitan Board of Works under the said enactments for the purposes of the said scheme, and the necessary works, buildings, pumping-station and machinery have since been constructed thereon by the Metropolitan Board of Works. Under the provisions of the Local Government Act 1888 the said hereditaments now belong to and are occupied and used by the London County Council as the successors of the said board.

3. The said works, buildings, pumping-station and machinery were designed and constructed for the work which they have to do in connection with and for the purposes of the metropolitan main drainage system of which they form an essential part, and the said hereditaments are occupied and used for the purposes of such drainage.

4. The said land, works, buildings, pumping-station and machinery were and are suitable and necessary to enable the London County Council to discharge their statutory duties under the said Acts and to dispose of the sewage, and are held, occupied and used by them solely for the purposes herein set forth.

5. The London County Council do not derive any pecuniary profits from the said hereditaments, and the pumping-station and works are maintained by them under the provisions of the above-mentioned Acts.

6. Under the provisions of the Metropolis Management Act 1855 and the Acts amending the same, and also under the Local Government Act 1888, the London County Council have power and are authorized to acquire, purchase or take on lease any lands or any easements or rights over or in any land for the purposes in those enactments mentioned.

7. The Court was of opinion and found as a fact that if the London County Council were not the owners of the said hereditaments assessed as aforesaid they would be willing to rent the said hereditaments for use, as the said hereditaments are now used, upon lease or agreement, and would be willing to pay a yearly rent for the same for the purposes of occupying and using them as part of and in connection with the metropolitan main drainage system; and that they would pay a yearly rent for the said hereditaments, used as they are now used, sufficiently high to support the gross and net rateable values respectively appearing in the said valuation list as hereinbefore mentioned. And the Court further found as a fact that the London County Council are practically the only possible tenants of the said premises as long as the said premises remain part of their main drainage system.

8. The Court further was of opinion and found as a fact that if the said land, works, buildings, pumping-station and machinery were not used for the main drainage scheme, but were disconnected therefrom and in the hands of a tenant who applied them to any other use or purpose for which they might be available, and the London County Council were not taken into consideration as possible tenants, then the gross value of the said land and premises for the purposes of the valuation list would be £1577 and the rateable value £1318.

9. The London County Council contended that the said land, works, buildings, pumping-station and machinery are only capable of beneficial occupation if used for purposes other than the said sewage purposes, and should be rated at the value at

which the same would let to a hypothetical tenant from year to year, supposing the same were not used as part of the said sewage system but were entirely disconnected therefrom and applied to any other use or purpose for which they could be made available, and that the London County Council must be excluded from consideration as possible hypothetical tenants, and that they should be rated according to the rule laid down by the Court of Queen's Bench in *Metropolitan Board of Works* v. *Churchwardens and Overseers of the Parish of West Ham* (1).

10. The assessment committee contended that in assessing the hereditaments aforesaid and fixing the gross and rateable values thereof the London County Council must be taken into consideration as possible tenants of the said hereditaments, and that their occupation is beneficial for the purposes stated, and that the principles laid down or acted on in the cases of *Burton-on-Trent Corporation* v. *Churchwardens and Overseers of the Parish of Egginton* (2) and *Reg.* v. *School Board for London* (3) were applicable to and governed this case.

11. The court of quarter sessions held that in arriving at the gross and rateable values of the hereditaments assessed as aforesaid and in assessing the same the London County Council were to be taken into consideration as possible hypothetical tenants, and held that the case was governed by the principles laid down or acted on in the said cases of *Burton-on-Trent Corporation* v. *Churchwardens, &c., of Egginton* (2) and *Reg.* v. *School Board for London* (3).

If the Court should be of opinion that the contention of the London County Council was correct and that the decision of the court of quarter sessions was erroneous in law, then the order of quarter sessions is to be quashed.

If the Court should be of opinion that the contention of the London County Council was wrong or that the decision of the court of quarter sessions was right in law, then the order of quarter sessions is to be confirmed.

The Queen's Bench Division (Wright and Collins JJ.) affirmed the order of quarter sessions. The Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.) reversed that decision and quashed the order of quarter sessions (1).

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(1) Law Rep. 6 Q. B. 193; 40 L. J. (M.C.) 30.

(2) 24 Q. B. D. 197; 59 L. J. (M.C.) 1.

(3) 17 Q. B. D. 738.

May 30. *F. Meadows White* Q.C. and *Danckwerts* for the appellants:—

In the earlier Act the expression used was "annual value"; in the later "gross" and "rateable" value, and the question depends on the proper application of these terms, which are defined in 32 & 33 Vict. c. 67 s. 4. The decision in the *Owens College Case* (2) was unsound. Pecuniary profit is not the main element to be considered. The case of *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (3) is quite consistent with the appellants' contention. In *Reg.* v. *Wallingford Union* (4) it was held that a workhouse was rateable; and Lord Denman C.J. at p. 269 said: "The occupation is not beneficial to the guardians individually; but the most advantageous mode of relieving their poor is an advantage to that body." That principle exactly applies here. It was admitted in the Court below that the premises were of some value, and then the only question is the amount of value. [They cited *Reg.* v. *Metropolitan Board of Works* (5); *Guest* v. *Overseers of East Dean* (6); *London County Council* v. *West Ham* (7); *Reg.* v. *Foundling Hospital* (8); *Hare* v. *Overseers of Putney* (9); *Corporation of Worcester* v. *Droitwich Assessment Committee* (10); *Tyne Improvement Commissioners* v. *Overseers of Chirton* (11); *Reg.* v. *Cooper* (12); *Clyde Navigation Trustees* v. *Adamson* (13); *Greig* v. *University of Edinburgh* (14).]

Bosanquet Q.C. and *Avory* for the respondents referred to the arguments used in the first appeal, and contended that cases such as *Gues* v. *Overseers of East Dean* (6) and *Mersey Docks and Harbour Board* v. *Llaneilian* (15), in which exemption was refused

(1) [1893] 1 Q. B. 210.
(2) 18 Q. B. D. 403.
(3) 15 Q. B. D. 597.
(4) 10 A. & E. 259.
(5) Law Rep. 4 Q. B. 15.
(6) Law Rep. 7 Q. B. 334.
(7) [1892] 2 Q. B. 44.
(8) Law Rep. 7 Q. B. 83.
(9) 7 Q. B. D. 223.
(10) 2 Ex. D. 49.
(11) 1 E. & E. 516.
(12) 23 L. J. (M.C.) 183.
(13) 4 Macq. 931.
(14) Law Rep. 1 H. L., Sc. 348.
(15) 14 Q. B. D. 770.

LONDON COUNTY COUNCIL v. CHURCHWARDENS &c. OF PARISH OF ERITH AND ASSESSMENT COMMITTEE OF DARTFORD UNION.

CHURCHWARDENS &c. OF PARISH OF WEST HAM v. LONDON COUNTY COUNCIL.

ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION v. LONDON COUNTY COUNCIL.

in the case of land over a non-rateable mine, and of cottages adjacent to a non-rateable lighthouse, were not in point. They also cited *New Shoreham Harbour Commissioners* v. *Overseers of Lancing* (1); *Corporation of Peterborough* v. *Stamford Union* (2); *Great Eastern Railway Company* v. *Hackney Board of Works* (3).

Meadows White Q.C. in reply.

The House took time for consideration.

Sept. 8. LORD HERSCHELL L.C. :—

My Lords, the London County Council, by whom the first of these appeals is presented, are the successors of the Metropolitan Board of Works, and are owners of the outfall works, pumping-station, and appurtenances, the rating of which is in question.

The sewage south of the Thames is conveyed to Crossness, in the parish of Erith, and for the purpose of discharging it into the Thames the Metropolitan Board of Works purchased thirty-seven acres of land, and constructed upon it these outfall works, pumping-station, and appurtenances.

It was agreed (paragraph 10 of special case) "that if the land, outfall works, and pumping-station in question were not in the possession of the appellants but in the hands of a private owner, and connected with the metropolitan sewage system, to be let to the appellants as tenants, they would be willing to pay a yearly rent for the same for the purpose of being used as part of, and in connection with, the metropolitan sewage system, sufficient to support the gross and net rateable value as fixed by the quarter sessions, as hereinbefore mentioned, but that except for the purposes of the metropolitan sewage system, and if the said works and premises were disconnected therefrom and, in the hands of a tenant, applied to any other use or purpose they might be available for, the rateable value of the land and premises would be £2678 gross, and £2143 net rateable value."

The appellants contended : "That the said works, pumping-station, and premises being only capable of beneficial occupation

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(1) Law Rep. 5 Q. B. 489.

(2) 31 W. R. 949.

(3) 8 App. Cas. 687.

H. L. (E.)
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London County Council v. Churchwardens &c. of Parish of Erith and Assessment Committee of Dartford Union.

Churchwardens &c. of Parish of West Ham v. London County Council.

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if used for other than the said sewage purposes, should be rated at the value for which the same would let to a hypothetical tenant from year to year, supposing the said works, pumping-station, and premises were not used as part of the said sewage system, but were entirely disconnected therefrom and applied to any other use or purpose for which they could be made available, and that the appellants should be rated according to the rule laid down by the Court of Queen's Bench in *Metropolitan Board of Works* v. *Churchwardens and Overseers of the Parish of West Ham* (1)."

The respondents contended: "That as the appellants would have been willing to pay a rent for the said works, pumping-station, and premises if they had not been the owners, they must be taken into account as hypothetical tenants from year to year in order to ascertain the rateable value of the said premises, and that the rule as laid down in the *Burton-on-Trent Corporation* v. *Churchwardens and Overseers of the Parish of Egginton* (2) governs this case."

The Queen's Bench Division gave judgment for the respondents, and this decision was affirmed by the Court of Appeal. No reasons were given in either Court, as the case was regarded as governed by the decision of the Court of Appeal in *Burton-on-Trent Corporation* v. *Churchwardens and Overseers of the Parish of Egginton* (2).

In the case of *Churchwardens and Overseers of the Poor of the Parish of West Ham* v. *London County Council* (3), which is also before your Lordships for judgment, the question was whether the London County Council were liable to be rated, and, if so, on what basis in respect of a portion of the main sewers and of the pumping-station situate in the parish of West Ham. So much of the outfall mains or sewers as are in that parish are constructed in an embankment on land purchased by the Metropolitan Board of Works, comprising about thirty-seven acres. It was agreed that if the land, sewers, pumping-station, and works were in the hands of a private person, to be let to the

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(1) Law Rep. 6 Q. B. 193; 40 L. J. (M.C.) 30.

(2) 24 Q. B. D. 197; 59 L. J. (M.C.) 1.

(3) [1892] 2 Q. B. 44.

London County Council as tenants, they would be willing to pay a sum sufficient to support the gross and rateable value, as determined by the quarter sessions; and that if the land, pumping-station, and works were disconnected from the metropolitan sewage system, and, in the hands of a tenant, applied to any other use or purpose, the gross estimated rental of the land, pumping-station, and works (exclusive of sewers) was £3125, and the rateable value £2500. The Divisional Court of Queen's Bench affirmed the order of the quarter sessions, but the Court of Appeal took a different view. The only question determined by the Court of Appeal was whether the sewers were rateable; whether the other works were rateable or not was withdrawn from their consideration.

The Master of the Rolls thought the sewers were not rateable, because, unless it were the London County Council, no tenant could be found who would give any rent for them, and that the London County Council could not be the hypothetical tenant for two reasons: first, because they had no power to take the sewers on lease; and, secondly, because they must occupy them subject to the restriction that they could make nothing by them. Fry L.J. thought that in order that a hereditament should be rateable three conditions must be fulfilled. First, there must be an occupier; secondly, a reasonable expectation of letting from year to year to a tenant; thirdly, a reasonable expectation of so letting at a rent of the kind prescribed by the Statute of William IV. He came to the conclusion that there was no suggestion of any other hypothetical tenant than the London County Council, and that they were not persons who could be deemed hypothetical tenants, inasmuch as they could not become tenants of sewers. Lopes L.J. said that if it had not been for *Reg.* v. *School Board for London* (1), to which I will refer presently, he should have thought that being occupiers under such statutory restrictions as those by which they are affected, and bearing in mind the fact that they must suffer a loss from their occupation, the London County Council were not the kind of hypothetical tenant contemplated by the statute.

In the case of *Assessment Committee of the St. George's Union* v.

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(1) 17 Q. B. D. 738.

London County Council (1), which also stands for judgment in your Lordships' House, the question raised by the special case was precisely the same as that raised in the *Erith Case* (2). It was found as a fact that if the London County Council had not been the owners of the lands, works, buildings, pumping-station, and machinery, they would have been willing to pay a rent for them sufficient to support the gross and net rateable value appearing in the valuation list. It was further found that if the lands, &c., were disconnected from the main drainage system and in the hands of a tenant who applied them to any other use or purpose for which they might be available, the gross value of the premises would be £1577, and the rateable value £1318. The London County Council contended before the quarter sessions that they ought to be rated at this lower value according to the rule laid down by the Court of Queen's Bench in *Metropolitan Board of Works* v. *Churchwardens and Overseers of West Ham* (3). The assessment committee contended that the assessment should be at the higher value. The Queen's Bench Division followed the *Erith Case* (2), which they considered identical in its facts, and upheld the higher assessment. The Court of Appeal reversed this decision. They held that the case was governed by the *West Ham Case* (4) decided by them, the effect of which I have just stated. In their view, no distinction could be drawn between the rateability of sewers and that of lands and pumping-stations, which were part of the sewerage system; that if the one subject were not rateable it followed that the other was not rateable either.

My Lords, I can see no distinction between the facts of the *Erith Case* (2) and those of the *St. George's Case* (1); they appear to me to be identical. The judgments of the Court of Appeal in the two cases are therefore in direct conflict. The former case was, as I have said, not argued, because it was supposed to be governed by the decision in the *Burton-on-Trent Case* (5).

The distinction drawn between the *Burton-on-Trent Case* (5), which was argued, and the *St. George's Case* (1), and, as far as I can see, the only possible distinction, was that whilst the Court held that in the *Burton-on-Trent Case* (2) the sewerage authority could have become tenants of the land and pumping-stations which they owned, it was not, in the opinion of the Court, within the power of the London County Council to become tenants of the land and pumping-station which belonged to them. I shall have presently to consider the validity of this distinction; but before doing so it will be convenient to call attention to the decision arrived at by the Court of Queen's Bench in 1868 upon a statement of facts identical with that which came before the Court of Appeal in the *Erith* (3) and *St. George's* (1) *Cases.* I refer to the case of *Reg.* v. *Metropolitan Board of Works* (4). Two points were raised in that case: first, whether the main sewers of the Metropolitan Board of Works were rateable; and, secondly, whether a pumping-station and other premises belonging to them were rateable. The Court of Queen's Bench (consisting of Cockburn C.J. and Lush, Hannen and Hayes JJ.) held that the sewers were not rateable.

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(1) [1893] 1 Q. B. 210.

(2) Not reported below, but referred to during the argument in the *St. George's Case* in the Court of Appeal [1893] 1 Q. B. at p. 219.

(3) Law Rep. 6 Q. B. 193.

(4) [1892] 2 Q. B. 44.

(5) 24 Q. B. D. 197; 59 L. J. (M.C.) 1.

With regard to the pumping-station the Court came to a different conclusion. They held that it was rateable, inasmuch as it had an occupation value. "The board" (said the learned judge who delivered the judgment of the Court) "must have rented such premises, if they had not become owners of them, and a tenant might easily be found to take them if the board were able and willing to let them. A distinction was attempted to be drawn in favour of pumping apparatus, as being a necessary adjunct to the sewers, and it was contended that as the sewers are not rateable this adjunct must be exempted as being part of a non-rateable subject. But we cannot accede to this view. The machinery stands on land which is valuable for occupation, and which would undoubtedly be rateable in the hands of any other occupier, and its rateable quality cannot be affected by the particular use to which it is applied by the board."

It may be that the actual judgment in the *St. George's Case* (1) is not at variance with the judgment of the Court of Queen's

(1) [1893] 1 Q. B. 210.

(2) 24 Q. B. D. 197; 59 L. J. (M.C.) 1.

(3) Not reported below.

(4) Law Rep. 4 Q. B. 15.

Bench in the case of *Reg.* v. *Metropolitan Board of Works* (1). The former case was so framed that if the Court were of opinion that the then appellants ought to be rated according to the rule laid down by the Court of Queen's Bench in the case of *Metropolitan Board of Works* v. *Churchwardens and Overseers of West Ham* (2) (to which I shall have presently to advert), and that the decision of the Court of Quarter Sessions, holding that the London County Council were to be taken into account as possible hypothetical tenants, and that the case was governed by the principles laid down in the *Burton-on-Trent Case* (3), was erroneous in law, the order of the quarter sessions was to be quashed. The judgment in the *St. George's Case* (4) merely quashed the order of quarter sessions; it was therefore right, even though the pumping-station were rateable, unless it were, according to the contention of the parish, rateable on the basis that the London County Council were to be taken into account as possible hypothetical tenants. But the Court of Appeal distinctly rested their judgment on the ground that the pumping-station was not rateable any more than the sewers, and that no distinction could be drawn between the two cases; whilst the Court of Queen's Bench in *Reg.* v. *Metropolitan Board of Works* (1) no less emphatically drew such a distinction and held the pumping-station to be rateable and the sewers not. The Court of Appeal did not canvass the reasons adduced in the judgment of the Court of Queen's Bench in *Reg.* v. *Metropolitan Board of Works* (1) for differentiating the two cases. The Master of the Rolls said that he was not in the least persuaded that the view taken by the Court of Appeal differed from the view which Lush J. took. The other learned judges made no reference to the Queen's Bench judgment.

My Lords, I have said enough to shew that the question of the rateability of these pumping-stations is at present in a most unsatisfactory condition. I purpose confining myself in the first instance to the question of the rateability of these pumping-stations, and to a consideration, if they be rateable, of the proper mode of assessing them, reserving for discussion at a later period the case of the sewers.

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(1) Law Rep. 4 Q. B. 15.

(2) Law Rep. 6 Q. B. 193; 40 L. J. (M.C.) 30.

(3) 24 Q. B. D. 197; 59 L. J. (M.C.) 1.

(4) [1893] 1 Q. B. 210.

The decision of this House in *Jones* v. *Mersey Docks* (1) marks an epoch in the law of rating. Many of the earlier decisions are tainted with this vice, that they proceed upon the supposition that lands held for public purposes are on that account not rateable. This doctrine is now exploded, your Lordships' House having distinctly determined that the circumstance that land is held by a public body for public purposes does not affect its rateability.

Much reliance was placed in the argument at the Bar in the present cases on the language used by Blackburn J. in delivering the opinion of the judges in *Jones* v. *Mersey Docks* (2). The learned judge said: "It is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the Bar), it is clear that a beneficial occupation is essential as the foundation of the rate." The learned judge, in my opinion, did not and could not have meant that it is essential to rateability that a particular occupier of the land can make a pecuniary profit by the use to which he is putting it. It is I think rateable whenever its occupation is of value.

At the time when the Metropolitan Board of Works purchased in the parish of Erith thirty-seven acres of land for the purposes of their works, the land was of course rateable. That it ceased to be so as soon as the Metropolitan Board of Works became the owners can scarcely be contended. For the purpose of discharging a duty imposed upon them by law they found it expedient to erect certain buildings upon the land and to connect them with sewers in other lands belonging to them. I am unable to see how this could produce the result that premises previously rateable ceased to be so. It is found as a fact, as I have already stated, that if the works were disconnected from the metropolitan sewage system and in the hands of a tenant applied to any other purpose for which they might be available, their net rateable

(1) 11 H. L. C. 443.

(2) 11 H. L. C. 443, 462.

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value would be £2143. Suppose some other system of sewage were adopted and the pumping-station were no longer applied to its present use, I do not think it could be doubted that the London County Council would be rateable in respect of it, and that its rateable value would be at least the sum thus fixed. If so, I cannot think that it is exempt from rateability at the present time on account of the particular use to which it is put by the owner—a use which it is clear might be abandoned at any time if it were thought expedient to do so. No obligation was imposed upon the Metropolitan Board of Works, and none is imposed on the London County Council, of maintaining in existence any particular sewage work.

My Lords, so far I have dealt only with the question of rateability; upon what principle the assessment ought to be made, and what considerations are proper to be taken into account, are questions which to my mind are involved in much greater difficulty.

In the case of the *Metropolitan Board of Works* v. *Churchwardens and Overseers of West Ham* (1), which came before the Court of Queen's Bench in 1870, the question was raised on what principle the Metropolitan Board of Works were to be assessed in respect of a pumping-station. It was held that they were to be assessed upon the basis of the rent which would be paid by a hypothetical tenant from year to year, supposing the pumping-station were not used for the purpose of main drainage, but was entirely disconnected therefrom, and applied to any other use or purpose for which it could be made available by a tenant. It was admitted by the learned counsel who appeared in that case for the respondents that the Metropolitan Board of Works were rateable upon the basis adopted by the Court. Before the quarter sessions the parish had contended that the proper principle to apply in rating property was to treat it as if belonging to and constructed by a private owner, and in his hands to be let to the board as yearly tenants; but this contention appears to have been abandoned before the Court of Queen's Bench. The suggestion that a public body who, in discharge of the duties imposed on them by law, have become the owners of land and buildings thereon, might be themselves taken into account as possible tenants, was, so far as I am aware, first insisted on in the case of *Reg.* v. *School Board for London* (1). The Court of Appeal held that, in determining what was the rateable value of a school board building, the school board might be regarded as possible tenants, and what they would have been willing, had they not been owners, to have paid as rent for the premises, might be taken into consideration. The arguments urged at your Lordships' Bar in the present case render it necessary to review this decision, and to determine whether it was sound in point of law.

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(1) Law Rep. 6 Q. B. 193; 40 L. J. (M.C.) 30.

The rule which is to govern the assessment of premises to the poor-rate was laid down by the Legislature in 6 & 7 Will. 4 c. 96 s. 1, which provided that: "No rate for the relief of the poor should be allowed or be of any force which should not be made upon an estimate of the net annual value of the hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

In the Act to provide for uniformity in the assessment of rateable property in the metropolis (32 & 33 Vict. c. 67 s. 4) the term "gross value" is defined as "the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament if the tenant undertook to pay all usual tenants' rates and taxes and tithe commutation rent-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent." The term "rateable value" is defined as meaning "the gross value after deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid."

So far as the question to be determined in this case is concerned I do not think the terms of the later Act are important.

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(1) 17 Q. B. D. 738.

"The annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament" is the same thing as "the rent at which the same might reasonably be expected to let from year to year."

It has never been doubted that the rent which is actually being paid by the occupier does not necessarily indicate what is the rent which a tenant might reasonably be expected to pay, or that an owner who is in occupation, and who may not be willing to let on any terms, is none the less rateable. The tenant described by the statute has always been spoken of by the Court as "the hypothetical tenant." Whether the premises are in the occupation of the owner or not, the question to be answered is: Supposing they were vacant and to let, what rent might reasonably be expected to be obtained for them? So far there can, I think, be no difference of opinion. But then arises the question: Is the owner to be regarded as one of the possible tenants in considering what rent might reasonably be expected? Bearing in mind what was the object of the Legislature in prescribing this test of annual value, I cannot myself entertain any doubt that the owner ought to be thus taken into account. I entirely concur in the decision arrived at by the Court of Appeal in the case of *Reg.* v. *School Board for London* (1). I think the circumstances of that case when examined are cogent to support the view which there obtained acceptance. If the school board were to hire buildings for the purpose of establishing a school, it could not be contested that these buildings would be rateable, and that the rent which the school board paid would be a most important element in determining the sum at which they were to be assessed. If instead of hiring school buildings they erected, upon land similarly situate, like buildings, or if they were to buy the reversion of the buildings they hired, and so became the owners, why in either of these cases should the assessment be different? The premises are to them in all these cases of the same value, and their occupation is equally beneficial: why should the sum at which they are to be assessed to the relief of the poor differ?

Again, suppose premises of occupation value for agricultural purposes were to be adopted by the owner for use in connection with the manufacture of some article under a patent process, which he alone was licensed to use, and that in their then condition no person would be willing to take them, would the premises cease to be rateable or be assessable only at a nominal sum although they might be much more valuable to the owner and their occupation much more beneficial than if they had remained fit for agriculture and in a condition to be readily let for that purpose? I cannot think so. These are illustrations. Many others might be adduced pointing in the same direction, and to my mind conclusively shewing that the object of the Legislature in enacting the provisions of the Statute of William IV., to which I have referred, would be defeated if the question what the owner would have given if the premises had been to let and he had been free to take them were discarded from consideration.

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(1) 17 Q. B. D. 738.

The decision arrived at in the *School Board Case* (1) was followed in the *Burton-on-Trent Case* (2), which related to a pumping-station in connection with a sewage farm.

In the case of the *Mersey Docks and Harbour Board* v. *Overseers of Llaneilian* (3), which was earlier than either of these cases, language was used by some of the learned judges which it is not easy to reconcile with the decision in the *Burton-on-Trent Case* (2); and, indeed, I am not sure that the decisions in the two cases are altogether consistent. In the *Mersey Docks Case* (3) the question to be decided was the rateability of the Mersey Docks and Harbour Board, and the principle upon which they were to be assessed in respect of a lighthouse, telegraph station, buildings, and lands within the parish of Llaneilian. By the Mersey Docks Acts, certain lighthouses theretofore erected, and also a system of telegraphs established for the information and benefit of shipping entering the port of Liverpool, became vested in the Mersey Docks and Harbour Board, to be maintained and worked by them. The lighthouse in question was one of those which had been previously maintained by the Trustees of the Liverpool Docks, and the lease of which for a term expiring in 1863 became vested in the appellants on their incorporation. The appellants afterwards purchased the freehold of the site of the lighthouse and some adjoining land, and spent a considerable sum in structural improvements of the lighthouse. The Master of the Rolls came to the conclusion as a matter of fact, that under the statutes regulating the matter the Conservancy receipts applicable to the maintenance of the lighthouse could never exceed the Conservancy expenditure; he came as a consequence to the conclusion that the hypothetical tenant must rent it subject to the Acts of Parliament, and that therefore it would be a profitless occupation, inasmuch as no person who received the earnings could make any profit therefrom. He therefore thought the lighthouse had no beneficial value, and that there could be no beneficial occupation. "That occupation is," he said, "(to repeat the phrase we used a short time ago) struck with sterility by the Acts of Parliament." The phrase to which the Master of the Rolls referred was made use of in the case of *West Bromwich School Board* v. *Overseers of West Bromwich* (1). In that case the question of the rateability of a school board in respect of a public elementary school belonging to them was raised for the first time. Expressions were used by some of the learned judges which do not seem to me to be quite in harmony with the views arrived at on more mature consideration of the matter in the case of *Reg.* v. *School Board for London* (2). There is, however, no conflict between the two decisions, inasmuch as the school board was held rateable. Bowen L.J. said: "I will assume that in the hands of the school board it is not capable of being beneficially occupied; but we must consider whether it is capable of being beneficially occupied in the hands of any other person. If land is by law struck with sterility when in any and everybody's hands, so that no profit can be derived from the occupation of it, it cannot be rated to the relief of the poor. But if the school-house is not used by this school board for any profitable purpose, it by no means follows that the site of it must be sterile in every other person's hands" (3).

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(1) 17 Q. B. D. 738.

(2) 24 Q. B. D. 197; 59 L. J. (M.C.) 1.

(3) 14 Q. B. D. 770.

(1) 13 Q. B. D. 929, 943, 944, 945.

(2) 17 Q. B. D. 738.

(3) 13 Q. B. D. at p. 942.

Now, if land is "struck with sterility in any and everybody's hands," whether by law or by its inherent condition, so that its occupation is, and would be, of no value to any one, I should quite agree that it cannot be rated to the relief of the poor. But I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable, and at what amount they should be assessed; and I do not think that a building in the hands of a school board is incapable of being beneficially occupied by them, and is not so occupied because they are prohibited from deriving pecuniary profit from its use. Fry L.J., in the case of *Reg.* v. *School Board for London* (1), said: "The term 'sterility' has been introduced into the cases because, as a general rule, a profit is produced; but it does not by any means follow that because there is no profit there is no value. There could be no better illustration of this than in the present case." I think the learned judge here points to the true test: whether the occupation be such as to be of value. This is the language used by Lord Blackburn, and I have already said that the possibility of making a pecuniary profit is not in my opinion the test whether the occupation is of value.

As the case of the *Mersey Docks and Harbour Board* (2) was much relied on by the counsel for the London County Council, I feel bound to say that I cannot agree with the view there adopted, that because no pecuniary profit could be derived from the Conservancy dues to which the board were entitled in respect of their lighthouse, its occupation was not a beneficial occupation, and had no pecuniary value, or that it was, in any sense which could exempt it from rateability, "struck with sterility." It appears that the lighthouse had at one time actually been held by the board as tenants. During that period its rateability could hardly be in question. Did the board become less rateable, or assessable on any different basis, because they ceased to be tenants and became the owners? The lighthouse, as it appears to me, was of value to the dock board, inasmuch as it assisted to protect from danger vessels which might use their docks and pay them dock dues.

(1) 17 Q. B. D. 738.

(2) 14 Q. B. D. 770.

I think some confusion has arisen from regarding the term "beneficial occupation" as meaning the same thing as an occupation by which a profit could be earned. As was pointed out by the Court of Queen's Bench in *Governors of Bristol Poor* v. *Wait* (1), this is not its meaning when used as a test of rateability. The Governors of the Poor of Bristol had taken certain property outside the limits of their city for the purpose of putting out their poor, either simply to lodge them or to employ them at their discretion. In holding the governors rateable Lord Denman C.J., in delivering the considered judgment of the Court of Queen's Bench, said: "The absence of 'beneficial occupation' was also much insisted upon; and it was contended that *that* is the true criterion to ascertain whether property be rateable or not. It is not to be denied but that this phrase, 'beneficial occupation,' has been in frequent use; and, generally speaking, it serves tolerably well to convey rather a popular notion than to give a certain rule for deciding the question of rateability in every instance. Because, if by beneficial be meant *profitable*, or anything like it, the expression is obviously fallacious."

There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, the profits earned and the share of those profits attributable to any particular hereditament have to be taken into account, and in such cases as these any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must of course be considered. But I do not think this class of cases affords any guide to the assessment of such hereditaments as those with regard to which your Lordships have now to lay down the proper principle of rating.

Owing to a statement made in the course of the argument at the Bar, I wish, in order to avoid possible misconception, to add a few words as to the method which ought to be followed when it is manifest that an owner would be willing to pay a higher rent than could be obtained from any other tenant. It was said that a practice prevails of taking 5 per cent. on the cost, in the case of buildings, as a basis for arriving at the rental. Such a rule of thumb may be all very well where the premises would be likely to find competing tenants, but is not by any means necessarily applicable where it is thought that the owner would be likely to give a higher rental than any one else. It would often be obvious that he would never be willing to pay the rent arrived at in such a fashion, inasmuch as it would be more advantageous for him to become the owner. There are many other circumstances, too, which may affect the answer to the question what the owner of premises would have been willing to give if instead of becoming the owner he had become the tenant of them. In all cases of the description of which I am speaking, the whole of the circumstances and conditions under which the owner has become the occupier must be taken into consideration, and no higher rent must be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises.

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(1) 5 Ad. & E. 1.

Having given my reasons for thinking that the judgment of the Court of Appeal in the *Burton-on-Trent Case* (1) was correct and that the principles there laid down are in accordance with the law, I turn now to the point which it was thought differentiated the *St. George's Case* (2) from the *Burton-on-Trent Case* (1), namely, that neither the Metropolitan Board of Works nor the London County Council could, under the statutes which gave them their powers, have become tenants of the pumping-stations, of which they were and are the owners.

The point was first glanced at in the judgment of the Master of the Rolls in *Reg.* v. *School Board for London* (3): "If" (said the learned judge) "by the terms of any statute, it" (the school board) "could not legally be tenant, it would be excluded from the calculation." The view thus suggested was adopted by the Court of Appeal as the ground of their decision in the case of *Owens College* v. *Overseers of Chorlton-upon-*

(1) 24 Q. B. D. 197; 59 L. J. (M.C.) 1. (2) [1893] 1 Q. B. 210.
(3) 17 Q. B. D. 738.

Medlock (1). The appellants were the governors of Owens College. The property rated consisted of land purchased by them for the college and college buildings erected and provided by them under the Owens College Act 1870. The governors were empowered to acquire and hold land as a site for the college, and other land not exceeding 200 acres. They were also empowered to grant leases of the lands vested in them, except the site of the college. The college could not be carried on as a collegiate institution at a profit in a commercial sense. The lands had been purchased at an expense of £25,000 and upwards, and the buildings had cost more than £125,000. The respondents had assessed the governors of the college at the rateable value of £3285. The case stated found that, if let for any purposes to which (without considerable structural alterations) they were capable of being turned, they would not let for more than £1300 per annum gross rental. Upon the basis of a rateable value thus arrived at, the college authorities were willing to be assessed. The Master of the Rolls said that if the college could be considered as possible tenants, that valuation would be wrong. The test for the determination of the case seemed to him to be whether they could legally be tenants of the site for the purposes of the Act: "for if they could not" (said the learned judge) "can it be right to say that what they would give for rent should be taken into account?" After giving his reasons for thinking that the site which the governors were authorized to take was what they were to acquire as owners in fee simple, the learned judge proceeded: "If so, it appears to me to follow that they ought not to be taken into consideration as hypothetical tenants. Can it be supposed that the governors are seeking to become tenants of a site when the Act of Parliament says they cannot be tenants? It seems to me that the proposition involves the answer to it."

The other learned judges concurred in this view. Bowen L.J. said: "It seems to me that they ought to be excluded from the class of persons who might reasonably be expected to give a rent for the premises, because they cannot, as matters stand, ever become tenants of the premises for the purposes of a site for the

(1) 18 Q. B. D. 403.

Lord Herschell, L.C.

college; a fetter is already imposed upon them, and they can never now hold the premises, except as owners in fee simple." Fry L.J. said: "It seems to me that the result is that the land is dedicated for ever as the site of a building for the college, and that the appellants are incapable of hiring that land for the purposes of the college, and therefore that the contention is well founded that, being prohibited from hiring the land they cannot be taken into consideration as possible tenants."

My Lords, I have stated fully the reasons which led the learned judges to the conclusion that the governors of Owens College were to be left out of account as possible tenants when determining the annual value of the premises occupied by them, and I have most carefully considered these reasons with all the respect which is justly due to the views of the learned judges who concurred in them; but I am unable to share the opinion which they expressed. The conclusion arrived at is in its result sufficiently startling. Two public bodies might have erected buildings similar in all respects upon lands similar in situation and of equal value; and these buildings might be occupied in the same way and applied to the same purposes; and yet, if one of these bodies had power, under the statute constituting it, to hire such buildings, and the other had no such power, the rateable value of the buildings might, and almost certainly would, be different; that is to say, the buildings would have a different annual value, for the words in the Statute of William IV., which follow the expression "annual value," only provide a means of arriving at what is the annual value of the premises. Why should the annual or the rateable value of the premises for the purposes of the poor law depend upon the statutory power of the owner to take them, supposing he had not been the owner? I am unable to discover any satisfactory reason for this difference, and none seems to me to be suggested by the judgments in the *Owens College Case* (1). I do not think the distinction drawn can be confined to premises belonging to and occupied by public bodies for public purposes. A private individual might receive money under an obligation to erect with it a building upon a particular site to be occupied

(1) 18 Q. B. D. 403.

by him during his lifetime, and with a prohibition against letting to any one else. If the principle adopted in the *Owens College Case* (1) be a sound one, such an owner would, I presume, be equally excluded from consideration. No attempt was made to shew that it was reasonable or just that the distinction drawn in that case should affect the rateability of premises or their assessment to the poor-rate; it appears to have been thought a necessary consequence of the application to such a case of the rule for the assessment of property laid down by the Statute of William IV. No doubt if this were so the conclusion reached was a right one, however unsatisfactory or even unjust it might be, that the rateability or assessment of premises in other respects similar, and occupied for similar purposes, should depend upon whether the owner could have taken the premises which he occupied as tenant, or was only enabled to become the owner of them. But having regard to the language used in the statute, and the construction which has been put upon it, I do not myself feel the difficulty by which the Court of Appeal seem to have been pressed. An owner who is in occupation of premises can, of course, never reasonably be expected to take them as tenant from year to year—he cannot become tenant to himself. Yet it has been held that the rent which, if the property were in other hands, he would be willing to pay, may be taken into account when inquiring what is its annual value; that is, at what sum it might reasonably be expected to let from year to year. If the hypothesis be admissible that the owner might himself be amongst the possible tenants, although, as a matter of fact, he could not be so, it seems to me no more violent hypothesis to conceive him as amongst the possible tenants, even although he may be subject to certain legal restrictions which would prevent his becoming so. And, having regard to the scope and object of the enactment in the Statute of William IV., I can see no sufficient reason why, if in the one case he may be regarded as the hypothetical tenant, he may not equally be so regarded in the other. It seems to me that a contrary conclusion ought not to be arrived at unless the provisions of the statute inexorably require it.

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(1) 18 Q. B. D. 403.

For these reasons, my Lords, I am of opinion that the judgment in the *St. George's Case* (1) cannot be supported, even on the assumption that the Court of Appeal rightly held that the London County Council were only empowered to become the owners, and could not, in fact, have become the tenants of the pumping-stations in question. It follows, in my opinion, that the judgment in the case of *London County Council* v. *Churchwardens, &c., of Erith* (2) ought to be affirmed, and the appeal dismissed with costs; whilst in the case of *Assessment Committee of St. George's Union* v. *London County Council* (1) the judgment must be reversed with the usual consequence as to costs.

I now turn to the separate case of the rateability of the main outfall sewers in the parish of West Ham. But before dealing with the particular facts relating to the main sewers in that parish, I desire to consider the case generally of the main sewers formerly vested in the Metropolitan Board of Works, and now in the London County Council. It was held, as I have said, that the sewers were not rateable. The ground of the decision was thus put by Lush J., who delivered the judgment of the Court: "We are of opinion that they are not rateable, on the short ground that they are not at present the subject of a beneficial occupation. No payment is made to the board for the use of them; the rates which they are empowered to levy are for the expense of construction and maintenance, and nothing more. Their occupation yields no profit to the board, as occupiers, either actual or potential" (3).

The effect of this decision was not to establish an exemption of property which down to that time had been rated. By sect. 135 of 18 & 19 Vict. c. 120, the main sewers then vested in the Commissioners of Sewers of the City of London, and in the Metropolitan Commissioners of Sewers, were vested in the Metropolitan Board of Works, and there was at the same time conferred on them the power to construct other sewage works to prevent the sewage within the metropolis passing into the River Thames near the metropolis. The case stated by the Court of Quarter Sessions in *Reg.* v. *Metropolitan Board of Works* (3) found as a fact, that neither the late Commissioners of Sewers nor the Metropolitan Board of Works had ever been rated to the relief of the poor in respect of the sewers. It appears, therefore, that for a very long period, both before and since the decision in *Reg.* v. *Metropolitan Board of Works* (1), this particular subject has not been treated as rateable. I cannot regard as altogether satisfactory, in view of the fuller consideration which has since been given to the matter, the grounds upon which the Court of Queen's Bench rested the non-rateability of these sewers; the judgment seems to assume that there can only be a beneficial occupation where it is such as to yield a profit to the public body occupying the premises. I have already said that, in my opinion, the true test is whether the occupation is of value, and not whether it is one by which pecuniary profit can be made. But it would, undoubtedly, be a serious matter that a hereditament which has for so long a period been deemed free from rateability should now, for the first time, be subjected to it. And there is this peculiarity about the particular subject with which I am dealing: until the sewer was made no rateable subject-matter existed where the sewer now is. If its use as a sewer were abandoned, its rateability would cease, for it is obvious that no person would be willing to take it at any rent. It is not like the case of land previously rateable which has been adapted to purposes different from those for which it was previously employed, and whose rateable character would not on that account be affected.

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(1) [1893] 1 Q. B. 210.

(2) Not reported below.

(3) Law Rep. 4 Q. B. 15, 22, 26.

I cannot pretend that the law of rating is at present in a satisfactory condition, or that by the application of well-settled principles the rateability of public bodies in respect of property such as that with which your Lordships are dealing can be rested upon a sound and consistent basis. In the case of *Sheffield United Gaslight Company* v. *Overseers of Sheffield* (2) Blackburn J., after quoting the observation of Wightman J. in the case of *Reg.* v. *West Middlesex Waterworks Company* (3) that there appeared so much difficulty in satisfactorily applying the parochial principle of rating by estimating the rent which a tenant would give for the subject-matter in such a case as that before him, as practically to amount nearly, if not entirely, to an impossibility of doing so satisfactorily; and after stating that the whole subject-matter appeared to be involved in so much difficulty and uncertainty that the Court had taken much time in considering whether they could not place the rules as to the rating of these companies on more intelligble and satisfactory principles capable of uniform application, added: "We have not, however, succeeded in laying down a rule which would be consistent with the existing legislation and decisions on the subject, and would at the same time be capable of being satisfactorily worked; and we are strongly impressed with the importance of not unsettling the law as established by past decisions where we cannot lay down a rule which is not open to exception. On the whole, therefore, we feel that our only course, until the Legislature shall think fit to interfere, is to adhere to the case of *Reg.* v. *West Middlesex Waterworks Company* (1)."

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(1) Law Rep. 4 Q. B. 15, 22, 26.

(2) 4 B. & S. 135.

(3) 1 E. & E. 716.

My Lords, I entirely concur with the learned judge in deeming it inexpedient to interfere in such a matter as this with a long course of practice supported by decisions which are not of very recent date. Therefore, even if it be not possible to rest upon grounds altogether satisfactory the exemption of these sewers, yet the case being, as I have said, a very particular one, I could not advise your Lordships to depart from a practice which has prevailed for a very long period, and which has been sanctioned by judicial authority.

So far, I have referred to the case of sewers under land the surface of which was occupied by other persons, and in ordinary course assessed to the poor-rate. But the particular case of the outfall sewer in West Ham is an exceptional one; that sewer is not constructed underground. Thirty-seven acres of land were purchased by the Metropolitan Board of Works for the purpose of this portion of the outfall sewer. The land so purchased had down to the time of its purchase been assessed to the poor-rate. The sewer is carried in an earthen and concrete embankment erected upon the land at an average height of twenty-one feet above the general surface of the land adjoining. The work thus constructed, therefore, differed from the mere creation of a sewer below the surface of land which continued afterwards, as before, liable to assessment, but was an adaptation, to the purposes of the board, of land already occupied and rated. I confess I see the utmost difficulty in distinguishing such an erection as this upon the surface of land from any other erection specially suitable for the purposes of a particular occupier, but which might render it of less value for occupation by other persons not requiring it for that special purpose. And if, in general, owners who occupy land in order to discharge a duty imposed on them by statute may be regarded as amongst the hypothetical tenants, I cannot find any sound basis on which to rest a distinction in favour of the Metropolitan Board of Works or their successors, the London County Council, in respect of this particular use of the land which they own.

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(1) 1 E. & E. 716.

It was, I am aware, held by the Court of Queen's Bench in the year 1870 that there was no distinction, for rating purposes, between a sewer underground and one carried upon an embankment (1); but I have already stated to your Lordships the only ground on which the exemption of the sewers generally can, in my judgment, be rested, and I have pointed out the distinction which exists between an underground sewer and an adaptation of land already rateable to a particular purpose. Lush J. stated that the rateable quality of land was not to be determined by what it once was, or by what it might thereafter become, but by what it was at the time the rate was made. I quite agree with this; but if it be the law that the owner of a hereditament may be regarded as amongst the hypothetical tenants, that rule would seem as applicable to the particular erection whose rateability is the matter in question as to any other.

For these reasons, my Lords, I am of opinion that even if the sewers are in general exempt from rateability the particular sewer work in the parish of West Ham cannot be so treated, and that the judgment of the Court of Appeal must therefore be reversed, and the judgment of the Queen's Bench Division restored; and I move your Lordships accordingly.

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(1) *Metropolitan Board of Works* v. *West Ham*, Law Rep. 6 Q. B. 193, 197.

LORD WATSON :—

My Lords, at the close of the argument upon these appeals all your Lordships were of one mind as to their disposal. I have very carefully considered, and I entirely concur in, the reasons for the judgment which have been so fully and clearly expressed by my noble and learned friend the Lord Chancellor.

LORD ASHBOURNE :—

My Lords, I concur. The first case was the only one in which I had an opportunity of sitting, and therefore my opinion is confined to that.

LORD MACNAGHTEN :—

My Lords, I also concur.

LORD MORRIS :—

My Lords, I also concur.

In the Erith Case: Order of the Court of Appeal affirmed and appeal dismissed with costs.

In the West Ham Case: Order of the Court of Appeal reversed and judgment of the Queen's Bench Division restored with costs here and below: Cause remitted to the Queen's Bench Division.

In the St. George's Case: Order of the Court of Appeal reversed and judgment of the Queen's Bench Division restored with costs here and below: Cause remitted to the Queen's Bench Division.

Lords' Journals 8th September 1893.

Solicitor for London County Council: *W. A. Blaxland.*

Solicitors for respondents in the Erith Case: *Pyke & Parrott for J. & J. C. Hayward, Dartford.*

Solicitor for appellants in the West Ham Case: *A. A. Banes.*

Solicitor for appellants in the St. George's Case: *W. J. Fraser.*

[HOUSE OF LORDS.]

H. L. (E.)
1893
Sept. 8.

THE BRITISH SOUTH AFRICA COMPANY . . . . APPELLANTS;

AND

THE COMPANHIA DE MOÇAMBIQUE AND OTHERS . . . . RESPONDENTS.

Jurisdiction—Trespass to Land—Land in Foreign Country—Declaration of Title to Land in Foreign Country—Defendant within Jurisdiction—Local Venue—Rules of Supreme Court Order xxxvi. r. 1.

The Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad; the rules of procedure under the Judicature Acts with regard to local venue (Order xxxvi. r. 1) did not confer any new jurisdiction.

The decision of the Court of Appeal ([1892] 2 Q. B. 358) reversed and the decision of Lawrance and Wright JJ. restored.

APPEAL from an order of the Court of Appeal (1).

In an action by the respondents against the appellants the plaintiffs by their statement of claim alleged (inter alia) that the plaintiff company was in possession and occupation of large tracts of land and mines and mining rights in South Africa; and that the defendant company by its agents wrongfully broke and entered and took possession of the said lands, mines and mining rights, and ejected the plaintiff company, its servants, agents and tenants therefrom; and also took possession of some of the plaintiffs' personal property and assaulted and imprisoned some of the plaintiffs.

Alternatively the plaintiffs alleged in paragraph 16 that the defendants did the above acts maliciously and without any just cause or excuse and with intent to injure and destroy the plaintiffs' trade and to deprive the plaintiffs of their lands, mines and mining rights and to put an end to their existence as a trading company in South Africa.

The plaintiffs claimed (inter alia) (1.) a declaration that the

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(1) [1892] 2 Q. B. 358.

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BRITISH SOUTH AFRICA COMPANY v. COMPANHIA DE MOÇAMBIQUE.

plaintiff company were lawfully in possession and occupation of the lands, mines and mining rights and other property; (2.) an injunction restraining the defendant company from continuing to occupy or from asserting any title to the said lands, mines and mining rights, and from withholding and keeping possession of the said other property; (3.) £250,000 damages.

The statement of defence in paragraph 1—as to so much of the statement of claim as alleged a title in the plaintiff company to the lands, mines and mining rights, and alleged that the defendants by their agents wrongfully broke and entered the same, and claimed a declaration of title and an injunction—whilst denying the alleged title and the alleged wrongful acts, said that the lands, mines and mining rights were situate abroad, to wit in South Africa, and submitted that the Court had no jurisdiction to adjudicate upon the plaintiffs' claim; and in paragraph 2 submitted that as matter of law paragraph 16 of the statement of claim disclosed no valid cause of action. The allegations in paragraph 9 of the defence are sufficiently stated at the close of the judgment of Lord Herschell L.C.

In paragraph 2 of the reply the plaintiffs objected that paragraphs 1 and 9 of the defence were bad in law, and alleged that paragraph 1 did not shew that there was any Court other than that in which this action was brought having jurisdiction to adjudicate on the plaintiffs' said claims; and the plaintiffs further alleged that there was no competent tribunal having jurisdiction to adjudicate on the said claims in the country where the acts complained of were committed; and that the acts complained of were illegal according to the laws of the country where the same were committed.

An order having been made for the disposal of the points of law thus raised by the pleadings, the Queen's Bench Division (Lawrance and Wright JJ.) made an order that judgment be entered for the defendants dismissing the action so far as it claimed a declaration of title to land, and also so far as it claimed damages or an injunction in relation to trespass to land, and also as to such portion of paragraph 16 of the statement of claim as referred to trespass to land; the objections raised by paragraph 2 of the reply being overruled.

The Court of Appeal (Fry and Lopes L.JJ., Lord Esher M.R. dissenting) made an order which—after reciting that the plaintiffs by their counsel had abandoned their appeal so far as it related to a declaration that the plaintiff company were lawfully in possession and occupation of the lands, mines and mining rights and other property in the statement of claim mentioned, and also so far as it related to an injunction restraining the defendant company from continuing to occupy or from asserting any title to the said lands, mines and mining rights and from withholding and keeping possession of the said other property—ordered that the order of the Queen's Bench Division do stand affirmed as regards so much of the relief sought by the statement of claim as aforesaid; but as to the residue of the relief sought by the statement of claim declared that Her Majesty's Supreme Court has jurisdiction to entertain the same; and ordered that the question as to the plaintiffs' demurrer to the 9th paragraph of the defence do stand over until the trial of the action, to be dealt with by the judge at the trial.

The defendants appealed against this order except as to that part which affirmed so much of the decision of the Queen's Bench Division as aforesaid.

May 4, 5, 8, 12, 15, 16, 18. *Cohen* Q.C. and *Lord Robert Cecil* (*Hollams* with them) for the appellants:—

The question was in the first instance one of title, but the prayer for a declaration of title was abandoned and the case is now confined to trespass. The Courts have always refused to entertain cases of trespass to lands abroad; and apart from express words such as are not to be found in the Judicature Acts, the High Court cannot determine an action which previously to 1873 was outside its competence. Lopes L.J. held that the Courts of this country always had the inherent jurisdiction to try an action for trespass abroad; and Fry L.J. partly based his decision on the absence of any other Court which could entertain the action. But no change in the law of venue can supply the want of jurisdiction. By 3 & 4 Wm. 4 c. 42 s. 22 local actions were made triable in any county. It cannot be said that either this section or the Judicature Acts increase the area of jurisdiction of our Courts. A legal fiction was it is true introduced, and jurisdiction was claimed and exercised in transitory actions which purported to be based either on statutes which could be found, or as Lord King said, on those which "had undoubtedly been lost." Consult 2 Bac. Abr. tit. Courts 384–5; Lord Hale's History of the Common Law p. 7–9. At one time it was thought that our Courts had no jurisdiction over transitory actions abroad: Co. Litt. book iii. c. 7, s. 440. Coke there referring to *Dowdale's Case* (1) said an obligation made beyond seas might be sued in England in what place the plaintiff will: e.g. at Bourdeaux in France, in Islington in the county of Middlesex. So in *Ward's Case* (temp. Charles I.) (2) it is said that Antwerp or "Callis Sands" may be taken to be a house in London. If not in England, it would be outside the jurisdiction. The Courts took cognisance of locality to this extent, that they could not hold Dovedale to be in London. It was not merely a question of venue—but one of jurisdiction. In *Jennings* v. *Hankyn* (2 James II.) (3) it was said: "This Court is of an universal jurisdiction and superintendency"; but that language was expressly confined to this country and did not apply to such a case as that of a plaintiff's declaring on a bond which "was made at Bourdeaux in France, for in such case this Court never had any jurisdiction." See Selden, Mare Clausum book ii. c. 24. In *Skinner* v. *East India Company* (4) it was held that the part of the claim which dealt with an island under the dominion of a foreign prince could not be maintained. But Lopes L.J. held that case inapplicable because there restitution and not damages was sought. In *Shelling* v. *Farmer* (5) Eyre C.J. held that the seizure of a house in the East Indies was not triable in England. Wright J. observed below that Lord Mansfield in *Mostyn* v. *Fabrigas* (6) seems to have had a misreport of *Shelling* v. *Farmer* (5) before him and declined to follow some of the dicta of Lord Mansfield in that case. *Mostyn* v. *Fabrigas* (6) and the cases there cited by Lord Mansfield have no application to a case where the title to land is raised. In

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(1) 6 Rep. 47 b.
(2) Latch, 4.
(3) Carth. 11.
(4) 6 State Trials, 710.
(5) 1 Str. 646.
(6) 1 Cowp. 161.

Doulson v. *Matthews* (1) it was held that trespass will not lie in this country for entering a house in Canada. Eyre C.J. in *Ilderton* v. *Ilderton* (2) said (at p. 161): "Our books are full of cases upon the subject of venues and the doctrine is very nice and curious. It was anciently the opinion of lawyers, that a jury of one county could not try any matter arising within another county, and a foreign *county* was almost as formidable a thing in point of jurisdiction to try as a foreign *country* . . . . Of matters arising in a foreign country . . . . we have no proper original jurisdiction." In that case a marriage in Scotland was held to entitle to dower in England, but it was because the marriage only arose incidentally in the suit in dower "of which we have original jurisdiction."

[Lord Herschell L.C. referred to the note to *Parker* v. *Crook* (3): "The words 'In Indibus Orientalibus' do not necessarily import the place to be out of England. There is a place called Holland in Lincolnshire, and there may be a Fort St. George in the parish of St. Martin's."]

In *Rafael* v. *Verelst* (4) De Grey C.J. speaks of crimes being in their nature local. Wright J. has sufficiently dealt with that case below. In *Can* v. *Cary* (5) it is said that "where an agreement is at land and a performance is at sea, it shall be tried where the agreement is made." And see *Buron* v. *Denman* (6). The true view of the law is expressed by Marshall C.J. in *Livingston* v. *Jefferson* (7); and see *Rundle* v. *Delaware and Raritan Canal* (8). Jurisdiction must not be assumed to exist, it must be proved in each case: *Mayor of London* v. *Cox* (9). In *The M. Moxham* (10) the question of jurisdiction was waived and the law of Spain was held to apply to a tort committed in Spain. In *Whitaker* v. *Forbes* (11) an action for arrears of rentcharge issuing out of land in Australia was held not to be maintainable. The decision was affirmed on appeal (12). Where jurisdiction has been acquired by a legal fiction the Courts will not extend it: *Norris* v. *Chambres* (1); *Reg.* v. *Keyn* (2). *White* v. *Sanborn* (3) decides that an action of covenant founded on privity of estate is local. In *Watts* v. *Kinney* (4) it was held that an action on the case for injury to real property situated in another State could not be maintained in the State of New York. Blackstone (vol. 3 p. 107) says: " As the Courts of Common Law have obtained a concurrent jurisdiction with the Court of Chivalry with regard to foreign contracts by supposing them made in England, so it is no uncommon thing for a plaintiff to feign that a contract really made at sea was made at the Royal Exchange or other inland place in order to draw the cognisance of the suit from the Courts of Admiralty to those of Westminster Hall. This the civilians exclaim against loudly as inequitable and absurd: and Sir Thomas Ridley hath very gravely proved it to be impossible for the ship in which such cause of action arises to be really at the Royal Exchange in Cornhill." In *Reg.* v. *Keyn* (2) Lindley L.J. expresses his opinion that the 28 Hen. 8, c. 15 did not extend the jurisdiction of the Commissioners either over a larger district or a larger class of persons; and see the observations of Lord Coleridge C.J. at p. 151. In that case all the judges who held that there was jurisdiction thought it necessary to prove that the particular Court had the jurisdiction.

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(1) 4 T. R. 503.
(2) 2 H. Bl. 145.
(3) 10 Mod. 255.
(4) 2 W. Bl. 1055.
(5) 12 Mod. 34.
(6) 2 Ex. 167.
(7) 1 Brockenbrough, 203, 206.
(8) 1 Wallace Jun. 275.
(9) Law Rep. 2 H. L. 239, 261.
(10) 1 P. D. 107–9.
(11) Law Rep. 10 C. P. 583.
(12) 1 C. P. D. 51.

The contention of the respondents, that the jurisdiction depends, not upon the place where the cause of action has arisen, but upon whether the person or thing against which the judgment is sought is within the territory of the nation in which the courts are situated, is too wide. The jurisdiction cannot depend simply on whether the defendant is or is not in England. At common law when the defendant was abroad the remedy was distringas or outlawry: see Report of Commissioners on Pleading 1851 pp. 5–7. The Court cannot order service of process abroad without statutory authority: per Bowen L.J. in *In re King & Co.'s Trade-mark* (5). No Court in this country has direct

(1) 3 D. F. & J. 583.
(2) 2 Ex. D. 63, 87.
(3) 6 New Hampshire Rep. 220.
(4) 6 Hill's New York Rep. 82.
(5) [1892] 2 Ch. 462, 482.

original jurisdiction with respect to real estate abroad: *Attorney-General* v. *Stewart* (1); Story's Conflict of Laws ss. 550–555.

[Lord Herschell L.C. referred to Erskine's Institutes vol. 1 bk. i. tit. Jurisdiction, pp. 25, 33.]

The Courts may in some instances have extended their jurisdiction by a fiction; but if they recognised the claims of the respondents there would be no limit to their jurisdiction: *Norris* v. *Chambres* (2).

The respondents contend that the only difficulty in the jurisdiction to entertain an action for trespass to land abroad was one of procedure and has been removed by the Judicature Acts. Brett L.J. in *Britain* v. *Rossiter* (3) said: "The true construction of the Judicature Acts is that they confer no new rights: they only confirm the rights which previously were to be found existing in the Courts either of Law or of Equity; if they did more they would alter the rights of parties, whereas in truth they only change the procedure." So Bowen L.J. in *Macdonald* v. *Tacquah Gold Mines Company* (4) said that the Judicature Acts "do not give any right which did not previously exist, but only another mode of procedure." In *Westbury Rural Sanitary Authority* v. *Meredith* (5) Baggallay L.J. said at p. 309: "The Judicature Act does not confer on the High Court a jurisdiction which neither the Court of Chancery nor the Courts of Common Law possessed before it was passed." See per Cotton L.J. in *In re Mills' Estate* (6); and *In re Hawthorne* (7), where at p. 747 Kay J. said that he was not aware that a contested claim to foreign lands had ever been entertained by an English Court. See also *Ellis* v. *McHenry* (8).

[Lord Herschell L.C. referred to *Ewing* v. *Orr Ewing* (9) per Earl of Selborne L.C. at p. 40.]

In *Earl of Derby* v. *Duke of Athole* (10) Lord Hardwicke held that in a plea to the jurisdiction it must be shewn what other

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(1) 2 Mer. 143, 156.

(2) 29 Beav. 246, 53; 3 D. F. & J. 583.

(3) 11 Q. B. D. 123, 129.

(4) 13 Q. B. D. 535, 539.

(5) 30 Ch. D. 387.

(6) 34 Ch. D. 24, 33.

(7) 23 Ch. D. 743.

(8) Law Rep. 6 C. P. 228.

(9) 9 App. Cas. 34.

(10) 1 Ves. Sen. 202.

Court has jurisdiction; but that was explained in the same case in 2 Ves. Sen. at p. 356, where Lord Hardwicke expressed doubts. On this point see also *Nabob of Arcot* v. *East India Company* (1). The cases just cited only shew that a proper plea to the jurisdiction must specify the Court which has jurisdiction; but a plea in bar would be that no municipal Court had jurisdiction: *Doulson* v. *Matthews* (2); *Livingston* v. *Jefferson* (3). In *Penn* v. *Lord Baltimore* (4) it is said (at p. 446) that a plea to the jurisdiction must be offered at the outset. The actual decree in *Penn* v. *Lord Baltimore* (4) is given in Belt's Supplement (206) and is very special in its terms. In *Pike* v. *Hoare* (5) Lord Henley held that a will affecting lands in the Colonies "is not triable" in this country. If the respondents' contention were upheld the Courts would have unlimited jurisdiction in all cases everywhere arising between British subjects. In 2 Kent's Commentaries pp. 463–4 it is laid down that trespasses on real property are properly referable to the forum rei sitae. The limits of the jurisdiction are laid down in Story's Conflict of Laws s. 544. "The doctrine," he says, "of the English Courts of Chancery on this head of jurisdiction seems carried to an extent which may perhaps in some cases not find a perfect warrant in the general principles of international public law;" and he cites *Lord Cranstown* v. *Johnston* (6). See also *Taylor* v. *Barclay* (7).

To sum up, (1.) the Courts at Westminster had no original jurisdiction outside the realm, though in some cases they acquired jurisdiction by legal fiction. (2.) They have always refused to extend the fiction to cases of trespass to land. (3.) The Judicature Acts have only changed procedure and not extended jurisdiction; and such jurisdiction does not exist over lands abroad. (4.) Crimes are strictly local, and the Judicature Acts cannot have given jurisdiction over crimes wherever committed. The distinction between local and transitory actions is well illustrated in *Rogers* v. *Woodbury* (8). The jurisdiction in these matters is decided, not by principles of international law, but by those of our own municipal law: see per Cockburn C.J. in *Reg.* v. *Keyn* (1). Co. Litt. book iii. c. 7, s. 440; Selden's Mare Clausum (1635); Vaughan's Reports (1677 tit. "Process into Wales" 404) of which Lord Hardwicke said that they contained "a great deal of sound and useful learning"; the case cited in *Dowdale's Case* (2); *Sadock* v. *Burton* (3); *Ward's Case* (4); *Jennings* v. *Hankyn* (5); *Ilderton* v. *Ilderton* (6) (nearly twenty years after *Mostyn* v. *Fabrigas* (7)); *Skinner* v. *East India Company* (8); *Shelling* v. *Farmer* (9); *Rafael* v. *Verelst* (10); *Doulson* v. *Matthews* (11); *Mayor of London* v. *Cox* (12); *Phillips* v. *Eyre* (13); *The M. Morham* (14); *White* v. *Sanborn* (15); all shew that actions affecting real property and crimes are strictly local in their character and cannot be tried, when they affect foreign countries, in this country. The Court of Chancery extended the jurisdiction; but that extension was only within such limits as it could conveniently enforce. The jurisdiction was confined to cases of trust, fraud and contract. No case has been or can be cited in which there has been a declaration of title to land abroad. In *Fryer* v. *Bernard* (16) no doubt Lord Macclesfield granted a sequestration against the defendant in Ireland, but it was only after a sequestration in England and nulla bona returned; and it was based on the ground, no longer tenable, that "the Courts of justice here have a superintendent power over those in Ireland." In *Northern Indiana Railroad Company* v. *Michigan Central Railroad Company* (17) it was held that one State has no jurisdiction in a case in which the matter of controversy lies in another. In *Boyse* v. *Colclough* (18) it was held that a decree of the Court of Chancery in Ireland could not be pleaded in bar to a suit in the Court of Chancery in England. See *R.* v. *Harris* (19) as to changing the venue of a criminal information. An elaborate discussion on the question of jurisdiction under the old law will be found in Prynne's "Brief Animadversions" on the Fourth Part of the Institutes (1669) c. 22 pp. 90–97.

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(1) 3 Bro. C. C. 292, 302.
(2) 4 T. R. 503.
(3) 1 Brockenbrough, 203.
(4) 1 Ves. Sen. 444.
(5) 2 Eden, 182; Amb. 428.
(6) 3 Ves. 170; 5 Ves. 277.
(7) 2 Sim. 213.
(8) 15 Pickering (32 Massachusetts) 156.

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(1) 2 Ex. D. 63, at pp. 159, et seq.
(2) 6 Rep. 47 b.
(3) Yelv. 202.
(4) Latch, 4.
(5) Carth. 11.
(6) 2 H. Bl. 145, 162.
(7) 1 Cowp. 161.
(8) 6 State Trials, 710.
(9) 1 Str. 646.
(10) 2 W. Bl. 1055.
(11) 4 T. R. 503.
(12) Law Rep. 2 H. L. 239.
(13) Law. Rep. 6 Q. B. 1.
(14) 1 P. D. 107.
(15) 6 New Hampshire Rep. 220
(16) 2 P. Wms. 261.
(17) 15 Howard (Sup. Ct. U.S.) 233.
(18) 1 K. & J. 124.
(19) 3 Burr. 1330.

Sir *Henry James* Q.C. and *Bompas* Q.C. (*T. Willes Chitty* with them) for the respondents:—

There are two causes of action: first trespass, and secondly injury to business. No doubt the question of title comes in incidentally by way of evidence to prove the case. The following propositions, for which there is ample authority, establish the respondents' claim. (1.) The Queen's Courts have jurisdiction over all persons within the realm. (2.) Those Courts are open to all suitors who can enforce the jurisdiction against all subjects against whom personally effectual relief can be given. (3.) All personal actions can be maintained if the defendants are within the jurisdiction. Now an action of trespass to real property—an action quare clausum fregit—is a personal action. Actions are of three kinds—real, personal and mixed: 3 Steph. Com. 2nd ed. pp. 430, 466. A mixed action is defined in 2 Bracton (ed. by Juris) p. 137 as being for a thing and against a person. This action in no sense answers to that definition. The same principle applies in French law. See Code de Procédure Civile, liv. 2, tit. 2, s. 59; Boullenois, Traité de la Personalité, etc. 601. In *Holmes* v. *Barclay* (1) it was held that an action would lie in Louisiana, where French law prevails, for damage done to property in another State, though by the laws of the latter the action would be local. By the law of Louisiana it was personal. There is, however, another classification of actions into 1. Local: 2. Transitory. According to our law quare clausum fregit is a local action—but it is also personal and is sometimes called a personal-local action. It is indisputable that our Courts have jurisdiction in all personal actions where the defendant is domiciled in this country. The objection that the action is local is only one of procedure. There is no want of jurisdiction, and the difficulty of procedure is removed where there is a defendant domiciled in this country against whom judgment can be enforced. The mere circumstance that the subject-matter of the action is abroad does not take away the jurisdiction. The case of crime committed abroad of course stands on a different basis, because the offence is against a foreign State. But the effect of holding that such an action as the present will not lie would be in many instances to prevent justice being done. If the wrong has been done, where is the action to be brought? If it was committed in a civilized country, the defendant might not be resident there. In the case of trespass to land in France, where is the Frenchman's remedy if the wrong-doer returns to England? In Erskine's Institutes of the Law of Scotland, i. p. 35 jurisdiction is said to be given by the defendant's being domiciled within the jurisdiction; and in *Graham* v. *Stevenson* (1788) (1) an action between Englishmen was entertained in the Court of Session —the cause of action being a combination to shut up an English inn on the ground that the defender was domiciled in Scotland.

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(1) 4 Louisiana Annual Rep. 63.

The mere absence from the reports of cases in which the cause of action arose abroad is evidence, not of want of jurisdiction, but of defect of procedure. When that obstacle was removed, the jurisdiction became exercisable. The fact that a local action could not be tried in a different county was not due to any want of jurisdiction—the King's Courts had jurisdiction everywhere in the realm. Originally the jurors were witnesses: Stephen's Pleading, 7th ed. 429. The first case of a witness other than a juror is given in the Livre des Assises (ed. 1679) 23rd Edw. iii. p. 110, No. 11. The evil of trying transitory actions elsewhere than in the place of contract was remedied by the statute of 6 Rich. 2, c. 2. The distinction between "local" and "transitory" is explained in Stephen's Pleading, ed. 1824, p. 306 and in Gilbert's History of the Practice of Civil Actions to be one of venue and not of jurisdiction. It is the same rule which prevented a Warwickshire action from being tried in Worcestershire. You could not speak of "Capetown in the county of Warwick," because there would be a variance. In 2 Co. Litt. s. 440 it is said that a trial could be held by certificate without a jury where the thing was done beyond sea. See also *Mullineux's Case* (Michaelmas, 24 Eliz.) (2); Viner's Abridgment tit. Trial (m.f.)

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(1) Hume's Decisions, 250.

(2) Moore (1675), 178.

Verdict. There was held to be no variance if a videlicet were inserted between the name of a foreign place and the county in which it was proposed to found jurisdiction. See per Willes J. in *Mayor of London* v. *Cox* (1); 2 Y. B. Edw. 4, p. 9; *Richardson* v. *Locklin* (2); *Warren* v. *Webb* (3). In *Rex* v. *Burdett* (4) Abbott C.J. said: "There was a time, however, when it was supposed that a jury could not even in a civil action inquire into a matter that did not take place in their own county." In *Bruckshaw* v. *Hopkins* (5) a plaintiff was allowed to bring back the venue after plea pleaded. On the jurisdiction of Courts of Equity in such cases see Story's Conflict of Laws, ss. 531, 538, 550, 552, where he says: "Personal actions may rightfully be brought between natives in any competent tribunal of the realm: and between foreigners also, who have submitted to the jurisdiction, wherever the laws allow its exercise; and between natives and foreigners in like manner. But in all these cases the domicil of the party defendant is commonly supposed to be within the jurisdiction." There is no more difficulty in principle in trying the title to land than to a ship. In *Scott* v. *Lord Seymour* (6) it was held that a British subject may maintain an action against a fellow-subject for an assault committed abroad. In *Lloyd* v. *Guibert* (7) Willes J. says: "Exceptional cases, should they arise, must be dealt with upon their own merits"; and it was held that the law of a ship's nationality governed the contract of affreightment. In *Brown* v. *Gracey* (8), where a promissory note was made in Scotland and sued on in England, it was held incumbent on the defendant to shew any difference between the laws of the two countries. In *Whitaker* v. *Forbes* (9) Blackburn J. said: "I do not think this case raises any question as to jurisdiction. . . . The case turns on the technical distinction between local actions, where the trial must be local, and transitory actions, and the question is one of venue only." The same principle was adopted in *Way* v.

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(1) Law Rep. 2 H. L. 239, 252.

(2) 6 B. & S. 777; 34 L. J. (Q.B.) 225.

(3) 1 Taunt. 379.

(4) 4 B. & Ald. 95, 171.

(5) 1 Cowp. 409.

(6) 1 H. & C. 219.

(7) Law Rep. 1 Q. B. 115, 129.

(8) Dow. & Ry. N. P. 41, note.

(9) Law Rep. 10 C. P. 583; 1 C. P. D. 51.

Yally (1) and in *Dutch West India Company* v. *Van Moses* (2). In all these cases the difficulty was one of procedure—of variance. If the jurisdiction claimed involved an actual interference with foreign land, it would not be exercised. It is abundantly clear that there is an inherent jurisdiction in the Court, where, as here, the remedy sought is in personam; and that the only hindrance to its exercise is one of procedure which has been removed: *Livingston* v. *Jefferson* (3). *Pike* v. *Hoare* (4), where the Court refused an issue to try the validity of an English will because it affected lands in Pennsylvania, is doubted by the learned editors of the reports.

The jurisdiction of the Court is that of the Crown, which is complete over its subjects everywhere. That jurisdiction can be extended by Parliament. Down to Lord Mansfield's time it was doubted whether a tort committed abroad could be tried here. That doubt is now removed, and even an assault by a foreigner on a foreigner committed abroad may be tried by the Courts of this country. See Wheaton's International Law, 3rd Eng. edn. by Boyd, s. 140; Burge's Commentaries on Colonial and Foreign Laws, vol. 3, p. 1016. In *Castrique* v. *Imrie* (5) Blackburn J. at p. 429 and Lord Chelmsford at p. 448 approve Story's words in Conflict of Laws, s. 592; see also Code de Procédure Civile, liv. 2, tit. 2, s. 59; Story's Conflict of Laws, s. 550; Dalloz Jurisprudence Générale, Action, s. 2; *Hart* v. *Herwig* (6); *Schibsby* v. *Westenholz* (7) per Blackburn J. p. 159. That our Courts are the proper forum, the defendants being domiciled here, is shewn by *Roussillon* v. *Roussillon* (8) and *Copin* v. *Adamson* (9). *Cookney* v. *Anderson* (10) decided that Consolidated Order x. r. 7, empowering the Court to order service of a copy of a bill "in any suit" upon a defendant out of the jurisdiction, applies only to suits concerning land, stock or shares within 2 Wm. 4 c. 33 and 4 & 5 Wm. 4 c. 82. The jurisdiction was affirmed, but the restriction in the character of the suit overruled by Lord Chelmsford L.C. in *Drummond* v. *Drummond* (1). It is sufficient if the Court at home has jurisdiction over either the person or the thing: *In re King & Company's Trade-mark* (2) per Bowen L.J. Down to the Judicature Acts, though there was no difficulty with respect to jurisdiction, there was a difficulty in regard to local actions and venue. That obstacle, by the abolition of local venue effected by Order XXXVI. r. 1, has now been removed.

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(1) 2 Salk. 651.

(2) 1 Str. 612.

(3) 1 Brockenbrough, 203, 208.

(4) 2 Eden, 182; Amb. 428.

(5) Law Rep. 4 H. L. 414.

(6) Law Rep. 8 Ch. 860.

(7) Law Rep. 6 Q. B. 155.

(8) 14 Ch. D. 351, 370.

(9) 1 Ex. D. 17.

(10) 1 D. J. & S. 365.

[Lord Herschell L.C. referred to *Whitaker* v. *Forbes* (3), *Doulson* v. *Matthews* (4) and *Neal* v. *DeGaray* (5).]

Whether the jurisdiction existed or not, the decisions in those cases must have been the same on the ground of procedure. *Mostyn* v. *Fabrigas* (6) distinctly lays down that these questions are not of jurisdiction, but of procedure. See, too, *Jackson* v. *Mayor of Barwick* (7).

There is no competent Court where the land is situate: there is no Court in the world, except in this country, where the action can be tried. In *R.* v. *Johnson* (8) Lord Ellenborough C.J. held that a plea to the jurisdiction cannot be merely negative but ought to give some other Court by which the matter may be tried. *In re Hawthorne, Graham* v. *Massey* (9) in which Kay J. refused to entertain an action for the purchase-money of foreign land is distinguishable, because there was no satisfactory evidence of the foreign law of real estate. But English Courts constantly enforce contracts made abroad, though the interpretation of the contract is governed by the local law. Paragraph 16 of the statement of claim is founded upon Bowen L.J.'s observations in *Mogul Steamship Company* v. *McGregor, Gow & Co.* (10). See also *Keeble* v. *Hickeringill* (11). The plaintiffs have not only local injuries but also transitory injuries to complain of: loss suffered in trade—breakage of furniture, assault and imprisonment, which are not the less personal and transitory because they arise out of trespass to land. In *Harvey* v. *Mayne* (1) the detention of a plaintiff was held illegal though he had defendant's goods in his possession. With respect to the allegations in paragraph 9 of the defence, the distinction between recognised and unrecognised foreign States is discussed in *Thompson* v. *Barclay* (2); *Thompson* v. *Powles* (3); *Taylor* v. *Barclay* (4). These cases are not altogether consistent with each other; but it is established that if the Sovereignty of an unrecognised State is set up in opposition to a recognised state—such as Portugal in the present case—the former will be disregarded: *Jones* v. *Garcia del Rio* (5), per Lord Eldon C.; *Dolder* v. *Bank of England* (6); *City of Berne* v. *Bank of England* (7); *Republic of Peru* v. *Dreyfus* (8); *Republic of Peru* v. *Peruvian Guano Company* (9). In *Martin* v. *Martin* (10) a mortgage of land in Demerara which was void by the law of Demerara, was enforced: the equity being held to attach only to the person and not to the estate. The Court had no difficulty in deciding though the title to foreign real estate was involved. So in *Cood* v. *Cood* (11) a contract between domiciled Englishmen relating to land abroad was held to be governed by English law and therefore cognisable by Courts in England, though it had been adjudicated upon by the Courts where the land was situate. A good title, if possession be held, is not necessary to maintain an action for trespass: *Graham* v. *Peat* (12). See also *Holmes* v. *Reg.* (13). *Ind, Coope & Co.* v. *Emmerson* (14) shews the enlargement of jurisdiction effected by the Judicature Acts.

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(1) Law Rep. 2 Ch. 32.

(2) [1892] 2 Ch. 462, 483.

(3) Law Rep. 10 C. P. 583; 1 C. P. D. 51.

(4) 4 T. R. 503.

(5) 7 T. R. 243.

(6) 1 Sm. L. C. 9th Ed. p. 665.

(7) Sid. 381.

(8) 6 East, 583, 597.

(9) 23 Ch. D. 743.

(10) 23 Q. B. D. 598, 613.

(11) 11 East, 574, n.

If a judgment of a foreign Court was relied upon, it is admitted there would be jurisdiction: and it follows from this admission that if proof is given of the personal and transitory injuries the Court may award damages. If the respondents are not entitled to the whole of this claim, they are at least entitled to the relief claimed in paragraph 16.

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(1) Ir. Rep. 6 C. L. 417.

(2) 6 L. J. (O.S.) Ch. 93; 9 L. J. (O.S.) (Ch.) 215.

(3) 2 Sim. 194.

(4) 2 Sim. 213.

(5) 1 Turn. & R. 297, 299.

(6) 10 Ves. 352.

(7) 9 Ves. 347.

(8) 38 Ch. D. 348.

(9) 36 Ch. D. 489, 497.

(10) 2 Russ. & M. 507.

(11) 9 Jur. (N.S.) 1335.

(12) 1 East, 244.

(13) 31 L. J. (Ch.) 58.

(14) 12 App. Cas. 300.

Cohen Q.C. in reply.

The House took time for consideration.

Sept. 8. LORD HERSCHELL L.C. :—

My Lords, the principal question raised by this appeal is whether the Supreme Court of Judicature has jurisdiction to try an action to recover damages for a trespass to lands situate in a foreign country.

It is not in controversy that prior to the Judicature Acts no such jurisdiction could have been exercised; but it is asserted on behalf of the respondents that the only barrier to its exercise was the technical one, that the venue in such a case must be local, and that the rules made under the Judicature Acts which have abolished local venues have removed the sole impediment which prevented the Courts entertaining and adjudicating on cases of this description. This contention has been sustained by a majority of the Court of Appeal, reversing the judgment of the Queen's Bench Division, with which, however, the Master of the Rolls agreed.

The nature of the controversy between the parties renders it necessary to consider the origin of the distinction between local and transitory actions, and the development of the law which determined the venue or place of trial of issues of fact.

It was necessary originally to state truly the venue—that is, the place in which it arose—of every fact in issue, whether those on which the plaintiff relied, or any matter stated by way of defence; and if the places were different, each issue would be tried by a jury summoned from the place in which the facts in dispute were stated to have arisen. After the statute 17 Car. 2, c. 8, which provided that "after verdict judgment should not be stayed or reversed for that there was no right venue, so as the cause were tried by a jury of the proper county or place where the action was laid," the practice arose, which ultimately became regular and uniform, of trying all the issues by a jury of the venue laid in the action, even though some of the facts were laid elsewhere. When juries ceased to be drawn from the particular town, parish, or hamlet where the fact took place, that is, from amongst those who were supposed to be cognisant of the circumstances, and came to be drawn from the body of the county generally, and to be bound to determine the issues judicially after hearing witnesses, the law began to discriminate between cases in which the truth of the venue was material and those in which it was not so. This gave rise to the distinction between transitory and local actions, that is, between those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality and those in which there is such a connection. In the latter class of actions the plaintiff was bound to lay the venue truly; in the former he might lay it in any county he pleased. It was, however, still necessary to lay every local fact with its true venue on peril of a variance if it should be brought in issue. Where a local matter occurred out of the realm, a difficulty arose, inasmuch as it was supposed that the issue could not be tried, as no jury could be summoned from the place, and it was by the general rule essential that a jury should be summoned from the venue laid to the fact in issue. It was, however, early decided that, notwithstanding the general rule, such matters might be tried by a jury from the venue in the action, and thus the difficulty was removed and the form was introduced of adding after the statement of the foreign place the words, "To wit at Westminster in the county of Middlesex," or whatever else might happen to be the venue in the action.

The point arose in 30 & 31 Eliz., in an action of assumpsit on a policy of assurance (1). The plaintiff declared that the defendant at London "did assume that such a ship should sail from Melcomb Regis, in the county of Dorset, to Abvile in France safely, and that the said ship in sailing towards Abvile, scilicet in the river of Soame in the realm of France, was arrested by the King of France." The parties came to issue whether the ship was so arrested or not, and this issue was tried before the Chief Justice in London, and found for the plaintiff. It was moved in arrest of judgment, that this issue, arising from a place without the realm, could not be tried; and, if it could, it was contended the jury should come from Melcomb, "for by common intendment they may have best knowledge of the arrest." But it was resolved that the issue should be tried where the action was brought. "Here," it was said, "the promise was made here in London, which is the ground and foundation of the action; and therefore there is in this case of necessity it shall be tried, or otherwise it should not be tried at all."

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(1) Cited in *Dowdale's Case*, 6 Rep. 47 b.

It is, I think, important to observe that the distinction between local and transitory actions depended on the nature of the matters involved and not on the place at which the trial had to take place. It was not called a local action because the venue was local, or a transitory action because the venue might be laid in any county, but the venue was local or transitory according as the action was local or transitory. It will be seen that this distinction is material when the Judicature Rule upon which so much turns comes to be examined.

My Lords, I cannot but lay great stress upon the fact that whilst lawyers made an exception from the ordinary rule in the case of a local matter occurring outside the realm for which there was no proper place of trial in this country, and invented a fiction which enabled the Courts to exercise jurisdiction, they did not make an exception where the cause of action was a local matter arising abroad, and did not extend the fiction to such cases. The rule that in local actions the venue must be local did not, where the cause of action arose in this country, touch the jurisdiction of the Courts, but only determined the particular manner in which the jurisdiction should be exercised; but where the matter complained of was local and arose outside the realm, the refusal to adjudicate upon it was in fact a refusal to exercise jurisdiction, and I cannot think that the Courts would have failed to find a remedy if they had regarded the matter as one within their jurisdiction, and which it was proper for them to adjudicate upon.

The earliest authority of importance is *Skinner* v. *East India Company* (1). The House of Lords in that case referred it to the judges to report whether relief could be obtained in respect of the matters mentioned in the petition, either at law or in equity, and if so in what manner. The judges answered, "that the matters touching the taking away of the petitioner's ship and goods and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon by His Majesty's ordinary Courts at Westminster. And as to the dispossessing him of his house and island, that he was not relievable in any ordinary Court of Law."

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(1) 6 State Trials, 710, 719.

Notwithstanding the opinion thus expressed, Lord Mansfield entertained and acted on the view that where damages only were sought in respect of a trespass committed abroad, an action might be maintained in this country, although it was one which would here be a local action (1). He referred to two cases which had come before him. One was an action against Captain Gambier for pulling down the houses of some sutlers. Objection was taken to the action founded on the case just referred to of *Skinner* v. *East India Company* (2). Lord Mansfield overruled the objection, on this principle, that the reparation was personal and for damages, and that otherwise there would be a failure of justice, for it was on the coast of Nova Scotia, where there were no regular Courts of Judicature, and if there had been, Captain Gambier might never go there again, and therefore the reason of locality in such an action in England did not hold. The other case was that of Admiral Palliser, who was sued for destroying fishing huts on the Labrador Coast, where, it was said, there were no local courts, and therefore whatever injury had been done there by any of the King's officers would have been altogether without redress if the objection of locality would have held. The consequence of that circumstance shewed (said Lord Mansfield) that "where the reason fails, even in actions which in England would be local actions, yet it does not hold to places beyond the seas within the King's dominions." It does not appear clear from the language used by Lord Mansfield that he would have regarded a trespass to land committed beyond the seas and outside the King's dominions as within the cognizance of our Courts.

(1) See *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 180.
(2) 6 State Trials, 710, 719.

The view acted on by Lord Mansfield in the two cases referred to has not been followed. It came before the Court of Queen's Bench for consideration in *Doulson* v. *Matthews* (1), which was an action of trespass for entering the plaintiff's house in Canada and expelling him therefrom. The decisions of Lord Mansfield were relied on by the plaintiff, but the action was held not to lie. Buller J. in delivering judgment said: "It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions: it is sufficient for the Courts that the law has settled the distinction, and that an action quare clausum fregit is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad; but not such as are in their nature local."

In saying that we may not try actions here arising out of transactions abroad which are in their nature local, I do not think that the learned judge was referring to the mere technical difficulty of there being no venue in this country in which these transactions could be laid, but to the fact that our Courts did not exercise jurisdiction in matters arising abroad "which were in their nature local." The case of *Doulson* v. *Matthews* (1) has ever since been regarded as law, and I do not think it has been considered as founded merely on the technical difficulty that in this country a local venue was requisite in a local action.

In the case of *Mayor of London* v. *Cox* (2), that very learned judge, Willes J., said: "And even in superior Courts themselves, where the subject-matter is such as to imply a local limit of jurisdiction, the exception is peremptory; there is no necessity for a dilatory plea, nor is the objection waived by pleading in chief. Thus, if an action of trespass to land situate abroad were brought in the Queen's Bench, the defendant need not plead a dilatory plea shewing what Court has jurisdiction; but if the foreign locality appeared upon the count he might demur, and if it did not appear he might plead in chief or bar a denial of the trespass (which would be assumed as alleged within the jurisdiction), and at the trial the plaintiff would be nonsuited or lose the verdict; and whether upon demurrer or plea the ordinary judgment would be given for the defendant (*Doulson* v. *Matthews*)."

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(1) 4 T. R. 503.

(2) Law Rep. 2 H. L. at p. 261.

It is clear that Willes J. regarded an action of trespass to land situate abroad as outside the local limit of jurisdiction of the Court of Queen's Bench. The same learned judge, in *Phillips* v. *Eyre* (1), said: "Our Courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land; and even with respect to those not falling within that description, our Courts do not undertake universal jurisdiction."

In the case of *The M. Moxham* (2), where injury had been caused to a pier belonging to an English company, but situated in a Spanish port, the ship, by the alleged negligent navigation of which the damage had been caused, was arrested in Spain, but was released on an agreement with the owners that their liability should be determined by proceedings in the English Courts. James L.J. said, that but for the agreement come to between the parties "very grave difficulties indeed might have arisen as to the jurisdiction of this Court to entertain any jurisdiction or proceedings whatever with respect to injury done to foreign soil."

The distinction between matters which are transitory or personal and those which are local in their nature, and the refusal to exercise jurisdiction as regards the latter where they occur outside territorial limits, is not confined to the jurisprudence of this country. Story, in his work on the Conflict of Laws (s. 551), after stating that by the Roman law a suit might in many cases be brought, either where property was situate or where the party sued had his domicil, proceeds to say that "even in countries acknowledging the Roman law it has become a very general principle that suits in rem should be brought where the property is situate; and this principle is applied with almost universal approbation in regard to immovable property. The same rule is applied to mixed actions, and to all suits which touch the realty."

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(1) Law Rep. 6 Q. B. at p. 28.

(2) 1 P. D. 107.

In section 553, Story quotes the following language of Vattel: "The defendant's judge" (that is, the competent judge) says he, "is the judge of the place where the defendant has his settled abode, or the judge of the place where the defendant is when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate. In such a case, as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the state in which it depends." He adds, in the next section: "It will be perceived that in many respects the doctrine here laid down coincides with that of the common law. It has been already stated that by the common law personal actions, being transitory, may be brought in any place where the party defendant can be found; that real actions must be brought in the forum rei sitæ; and that mixed actions are properly referable to the same jurisdiction. Among the latter are actions for trespasses and injuries to real property which are deemed local; so that they will not lie elsewhere than in the place rei sitæ."

The doctrine laid down by foreign jurists, which is said by Story to coincide in many respects with that of our common law, obviously had relation to the question of jurisdiction, and not to any technical rules determining in what part of a country a cause was to be tried. Story was indeed regarded by one of the learned judges in the Court below (1) as sanctioning the view that our rules with regard to venue in the case of local actions offered the only obstacle to the exercise of jurisdiction in actions of trespass to real property. The passage relied on is as follows (s. 554): "Lord Mansfield and Lord Chief Justice Eyre held at one time a different doctrine, and allowed suits to be maintained in England for injuries done by pulling down houses in foreign unsettled regions, namely, in the desert coasts of Nova Scotia and Labrador. But this doctrine has been since overruled as untenable according to the actual jurisprudence of England, however maintainable it might be upon general principles of international law, if the suit were for personal damages only."

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(1) Lopes, L.J., [1892] 2 Q. B. 420.

By the words "untenable according to the actual jurisprudence of England," I do not think Story was referring to the rule which in this country regulated the place of trial in the case of local actions. Nor am I satisfied that either Lord Mansfield or Story would have regarded an action of trespass to land as a suit for personal damages only, if the title to the land were in issue, and in order to determine whether there was a right to damages it was necessary for the Court to adjudicate upon the conflicting claims of the parties to real estate. In both the cases before Lord Mansfield, as I understand them, no question of title to real property was in issue. The sole controversy was, whether the British officers sued were, under the circumstances, justified in interfering with the plaintiffs in their enjoyment of it.

The question what jurisdiction can be exercised by the Courts of any country according to its municipal law cannot, I think, be conclusively determined by a reference to principles of international law. No nation can execute its judgments, whether against persons or movables or real property, in the country of another. On the other hand, if the Courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication in personam, it is by no means certain that any rule of international law would be violated. But in considering what jurisdiction our Courts possess, and have claimed to exercise in relation to matters arising out of the country, the principles which have found general acceptance amongst civilised nations as defining the limits of jurisdiction are of great weight.

It was admitted in the present case, on behalf of the respondents, that the Court could not make a declaration of title, or grant an injunction to restrain trespasses, the respondents having in relation to these matters abandoned their appeal in the Court below. But it is said that the Court may inquire into the title, and, if the plaintiffs and not the defendants are found to have the better title, may award damages for the trespass committed. My Lords, I find it difficult to see why this distinction should be drawn. It is said, because the Courts have no power to enforce their judgment by any dealing with the land itself, where it is outside their territorial jurisdiction. But if they can determine the title to it and compel the payment of damages founded upon such determination, why should not they equally proceed in personam against a person who, in spite of that determination, insists on disturbing one who has been found by the Court to be the owner of the property?

It is argued that if an action of trespass cannot be maintained in this country where the land is situate abroad a wrong-doer by coming to this country might leave the person wronged without any remedy. It might be a sufficient answer to this argument to say that this is a state of things which has undoubtedly existed for centuries without any evidence of serious mischief or any intervention of the legislature; for even if the Judicature Rules have the effect contended for, I do not think it can be denied that this was a result neither foreseen nor intended. But there appear to me, I confess, to be solid reasons why the Courts of this country should, in common with those of most other nations, have refused to adjudicate upon claims of title to foreign land in proceedings founded on an alleged invasion of the proprietary rights attached to it, and to award damages founded on that adjudication.

The inconveniences which might arise from such a course are obvious, and it is by no means clear to my mind that if the Courts were to exercise jurisdiction in such cases the ends of justice would in the long run, and looking at the matter broadly, be promoted. Supposing a foreigner to sue in this country for trespass to his lands situate abroad, and for taking possession of and expelling him from them, what is to be the measure of damages? There being no legal process here by which he could obtain possession of the lands, the plaintiff might, I suppose, in certain circumstances, obtain damages equal in amount to their value. But what would there be to prevent his leaving this country after obtaining these damages and re-possessing himself of the lands? What remedy would the defendant have in such a case where the lands are in an unsettled country, with no laws or regular system of government, but where, to use a familiar expression, the only right is might? Such an occurrence is not an impossible, or even an improbable, hypothesis. It is quite true that in the exercise of the undoubted jurisdiction of the Courts it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the Courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands.

Reliance was placed on the decisions of Courts of Equity, as shewing that our Courts were ready, when no technical difficulty of venue stood in the way, to adjudicate on the title to lands situate abroad. If the refusal of the Common Law Courts to exercise jurisdiction in cases of the nature now under consideration had been regarded as the result of a mere technical difficulty, I cannot help thinking that the Courts of Equity, which were, in early days, at all events, keen to supplement the deficiencies of the Common Law, when the requirements of justice were impeded by technical difficulties, would have found some means of affording a remedy. Lord Mansfield, in his judgment in *Mostyn* v. *Fabrigas* (1), refers to a case of an injury in the East Indies similar to that with which he had to deal in the case of Captain Gambier, in which Lord Hardwicke in a Court of Equity had directed satisfaction to be made in damages. But in this exercise of jurisdiction he has not been followed by any judge of the Court of Chancery.

Whilst Courts of Equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here. In *Lord Crawstown* v. *Johnston* (2), Sir R. P. Arden, Master of the Rolls, said: "*Archer* v. *Preston, Lord Arglasse* v. *Muschamp*, and *Lord Kildare* v. *Eustace*, clearly shew that with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situate in England."

Story, in his Conflict of Laws, ss. 544, 545, although he says that to the extent of the decision in *Crawstown* v. *Johnston* (1) there may, perhaps, not be any well-founded objection, nevertheless expresses the view that the doctrine of the English Courts of Chancery on this head of jurisdiction seems carried to an extent which may perhaps in some cases not find a perfect warrant in the general principles of international public law, and therefore it must have a very uncertain basis as to its recognition in foreign countries so far as it may be supposed to be founded upon the comity of nations. My Lords, the decisions of the Courts of Equity do not, to my mind, afford any substantial support to the view that the ground upon which the Courts of Common Law abstained from exercising jurisdiction in relation to trespasses to real property abroad was only the technical difficulty of venue.

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(1) 1 Cowp. 161, 180.

(2) 3 Ves. 170, 182.

In the case of *Whitaker* v. *Forbes* (2)—where the action was begun before but the demurrer was heard in the Court of Appeal after the Judicature Acts came into operation—the question arose whether the plaintiff could recover against a defendant resident in this country the arrears of a rent-charge issuing out of lands in Australia. The opinion expressed by Lord Blackburn in the course of the appeal in that case was much relied on by the respondents: "I do not think that this case" (said the learned judge) "raises any question as to jurisdiction, though in some respects it has been argued as if it did. The case turns on the technical distinction between local actions where the trial must be local, and transitory actions, and the question is one of venue only." It is unnecessary to consider whether in circumstances such as gave rise to the action of *Whitaker* v. *Forbes* (2) an action might, since the Judicature Rules came into force, be maintained in the Courts of this country. I do not think the dictum of the learned judge in that case can be regarded as of any great weight in determining the question with which your Lordships have to deal.

The terms of rule 1 of Order XXXVI., which are relied on by the plaintiffs, are as follows: "There shall be no local venue for the trial of any action except where otherwise provided by statute." The language used appears to me important. The rule does not purport to touch the distinction between local and transitory actions—between matters which have no necessary local connection, and those which are local in their nature. It deals only with the place of trial, and enables actions, whatever their nature, to be tried in any county. But it is, in my opinion, a mere rule of procedure, and applies only to those cases in which the Courts at that time exercised jurisdiction. It has been more than once held that the rules under the Judicature Acts are rules of procedure only, and were not intended to affect, and did not affect, the rights of parties. Thus in *Kendall* v. *Hamilton* (1) it was suggested that the law laid down in *King* v. *Hoare* (2) had been altered by the Judicature Acts owing to the abolition of a plea in abatement. Lord Cairns said: "I am unable to agree to this suggestion. I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions. And although the form of objecting, by means of a plea in abatement to the non-joinder of a defendant, who ought to be included in the action, is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed."

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(1) 3 Ves. 170.

(2) Law Rep. 10 C. P. 583; in C. A. 1 C. P. D. 51.

Again, in *Britain* v. *Rossiter* (3) Lord Esher M.R. said: "I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were found to be existing in the Courts either of Law or Equity."

According to the contention of the respondents in this case the rule under consideration had the effect of conferring upon them a right of action in this country which they would not otherwise have possessed. As I have already pointed out, a person whose lands, situate in this country, were trespassed upon always had a right of action in respect of the trespass. The rules relating to venue did no more than regulate the manner in which the right was to be enforced. But in respect of a trespass to land situate abroad there was no right of action, for an alleged right which the Courts would neither recognise nor enforce did not constitute any right at all in point of law.

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(1) 4 App. Cas. 503, 516.
(2) 13 M. & W. 494.
(3) 11 Q. B. D. at p. 129.

My Lords, I have come to the conclusion that the grounds upon which the Courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before. If this conclusion be well founded, I do not think that the allegation contained in paragraph 16 of the statement of claim, "that the defendant company did and committed the acts above mentioned and complained of with intent to injure and destroy the trade of the plaintiff company, and to deprive it of its aforesaid lands, territories, mines, minerals, and mining rights and property," disclosed a cause of action cognizable by our Courts any more than the paragraph complaining of trespass.

The 9th paragraph of the statement of defence alleged that the lands in question were in the possession of a certain native chief named Umtasa, who exercised sovereignty over the same, and that by a concession or treaty granted by Umtasa and his indunas or council to the defendants, they acquired the right to possession and occupation of the lands, and that the plaintiffs were wrongfully attempting to take possession of the lands, and that the defendants did the acts complained of in order to prevent the plaintiffs from so wrongfully taking possession of them. This defence was demurred to by the 2nd paragraph of the reply. The Queen's Bench Division overruled the demurrer; but the Court of Appeal varied this judgment by ordering the demurrer to stand over until the trial of the action, to be dealt with by the judge at the trial. The Master of the Rolls thought the decision of the Divisional Court on this point correct. And I do not understand that either of the learned judges who concurred in varying the order doubted that, if proved, the paragraph in dispute disclosed a valid defence in point of law. The case of *Thompson* v. *Barclay* (1) and others of the same description, in which it is said the Courts have refused to recognise the sovereign rights of provinces which had revolted from a State at amity with Great Britain, and whose independence was not shewn to have been recognised by the proper authorities in this country, appear to me to have no application to the circumstances of the present case. I do not see any sufficient ground for disturbing the judgment of the Queen's Bench Division on this point. Whether the plea can be proved, and whether the determination of any question raised by it will be for the judge and not the jury, is a question which does not arise at the present time.

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(1) 6 L. J. (O.S.) Ch. 93; 9 L. J. (O.S.) Ch. 215.

For the reasons with which I have troubled your Lordships at some length, I think the judgment appealed from should be reversed and the judgment of the Divisional Court restored, and that the respondents should pay the costs here and in the Court below, and I move your Lordships accordingly.

Lord Halsbury :—

My Lords, although I am unable to concur with the conclusion at which Lopes L.J. arrived, I think he stated very clearly the only real question which is in debate. That learned judge said that in his opinion the Courts of this country have and always had the inherent jurisdiction contended for, namely, the jurisdiction to try an action for trespass to land situated in a foreign country, and that the only objection to doing so arose from the technical rule of local venue: that is the question very plainly stated, and, if that be the correct view of the law, the legislation of 1873 having altered the technical rule, the action might be tried in England. I am, however, unable to concur in that view. It is true that the phrase "local venue" is technical, and would not, I think, have been intended by the learned persons responsible for the legislation of 1873 to have been understood to refer to any question of jurisdiction at all. Rules of procedure and practice in England would not, I think, in the contemplation of any one, touch questions of territorial or international jurisdiction. The word "venue" has come to be used as if it were literally equivalent to the word "place"; but that was not its original meaning, although the idea of place is included within it; but it is not accurate to speak of "venue" as though it referred to place in an unlimited sense.

No two questions can be more distinct than the question whether a matter is in the jurisdiction of the English Courts at all, and whether a matter undoubtedly within the jurisdiction of the Courts shall be assigned for trial to particular Courts in England. There is a concurrence of opinion of most jurists, if not all, as to the difference between what we call realty and personalty, by whatever words those things are distinguished in the jurisprudence of foreign countries, which affects very materially the right to try. Vattel distinguishes the questions which may properly be tried where defendant has his settled place of abode, but always subject to this, that if the matter relates to an estate in land or to a right annexed to such an estate, "in such a case, inasmuch as property of the kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the state in which it depends." I am quoting Story's version of Vattel's language (1). That very learned lawyer proceeds to point out that the distinction between local and transitory actions is one which is known to the common law. I somewhat doubt whether Story J. intended by his language to enter into the controversy as to whether the principle expressed in the maxim, "Debitum et contractus sunt nullius loci," is coeval with what we know as the common law. Lord Coke undoubtedly does say so in *Bulwer's Case* (2); but, as Serjeant Stephen points out, it is difficult to reconcile that view with the known history of our jurisprudence in respect of the original functions of the jury to whom was at one time committed the proof as well as the determination of a cause; and it is not consistent with the observations of Gilbert C.B. (Gilbert's History of Civil Actions p. 84). I think that what Story J. intended to refer to was the actual system of our common law at the time he wrote; and undoubtedly the current of authority at that time was all in one direction. Although the original state of our law may not be very important in respect of the controversy now before your

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(1) Story's Conflict of Laws, s. 553.

(2) 7 Rep. 3 a.

Lordships, there is one view of it that seems to me to throw a considerable light upon the question now in controversy.

The invention of fictions and the limit within which they were permitted is discussed at length in Prynne's Animadversions on, Amendments of, Additional records to, the fourth part of the Institutes, a mine of learning upon the subject of legal antiquities which the diligence of the learned counsel who argued this question at your Lordships' Bar has turned to skilful account. Prynne boldly states that no such fiction was permitted before the date of Henry VIII.; but the reasons given for the permitting of the fiction and the limitation within which it was permitted seem to me more important than its date. It was a principle of pleading well understood and rigorously enforced, that a traverse must not be taken on an immaterial point. Where therefore the actual place of, for instance, a debt or contract was alleged (though contrary to the fact) to be some place in England, the defendant was not at liberty to deny that the place alleged was in England, since in such matters the place was immaterial. But wherever the place was material, as the unvarying current of authorities establishes that it was in all controversies relating to land, the defendant might traverse the place, and, even if he did not, if it appeared in proof that the place was out of England, the plaintiff was nonsuited.

I do not think that one authority has been cited to your Lordships to the contrary, with the single exception of Lord Mansfield's references to what took place before himself and at Nisi Prius. My Lords, I confess that the authority of Lord Mansfield appears to me to prove too much. He appears to have surmounted the difficulty of local venue in a manner which is wholly irreconcilable with the argument so much pressed upon your Lordships, that the absence of precedent in the present action is accounted for throughout all English legal history by the objection that the rule of local venue formed a bar to an action being brought. But it appears to have been omitted to be considered that Lord Mansfield decided in the plaintiff's favour, and, so far as I can judge from the phrase used by his Lordship, "which in England would be local actions," he must have decided upon the ground that inasmuch as the action before himself was for trespass to realty abroad the action would not be limited by the rule of local actions in England. Whether the argument be good or bad, it certainly is not one which sustains the contention that it was the law of local venue which prevented such actions being tried in England. I further doubt very much whether the observations attributed to Lord Mansfield can be quite accurately recorded. His Lordship undoubtedly seems to have misunderstood the case of *Shelling* v. *Farmer* (1), since he attributes to Eyre C.J.'s decision the very reverse of what that learned judge decided. The plaintiff in that case sued for trespass to his person and to his house in the East Indies; and Eyre C.J. rejected evidence as to the house, though Lord Mansfield quotes him as overruling the objection. This was in 1739; in 1774 the case of *Mostyn* v. *Fabrigas* (2) was decided; and in 1792, in *Doulson* v. *Matthews* (3), Lord Kenyon and Buller J., in judgments which were supposed to have settled the law, held that as a matter of settled practice actions of trespass to land were local. In the opinions of the judges delivered to your Lordships' House by Willes J. it is stated, without any qualification, that an action of trespass to land abroad did not lie. It is difficult to construe Lord Mansfield's own language consistently with the view which he is supposed to have entertained; but whatever account may be given of his Lordship's utterances, which in respect of the matters before him in *Mostyn* v. *Fabrigas* (2) were undoubtedly obiter, I must say that I could not yield to his authority, when it is opposed to the views of so many judges from 1667 downwards.

There is one observation made by Fry L.J. in the Court of Appeal which appears to me to be subject to very much the same criticism which I have suggested in respect of Lord Mansfield's utterance, namely, that it proves too much. After describing the limitations upon the jurisdiction of the King's Courts the Lord Justice says that " gradually their jurisdiction was extended, especially by the legislation and the quo warranto proceedings of Edward I., until, in the lapse of time, it burst the barriers within which it was originally confined and came to be not inaptly described as ' a universal jurisdiction and superintendency.'" The Lord Justice was too severe a logician not to have measured the extent of the language which he thus quotes; but I am satisfied that he would himself have admitted that in thus speaking of the jurisdiction of the English Courts the words "universal" and "superintendency" must receive some limitation; and the only limitation that to my mind they are properly susceptible of would be by the addition of the words "over all Courts and causes in England." If they were to be understood according to the exact and precise meaning of the language employed without some such limitation, they would to my mind be so obviously inaccurate as not to require to be further dealt with.

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(1) 1 Str. 646.
(2) 1 Cowp. 161.
(3) 4 T. R. 503.

I am therefore of opinion that the judgment of Wright J. and of the Master of the Rolls was correct, and I think therefore that the judgment on this point should be reversed.

With respect to the alteration made in the order of the Queen's Bench Division as to the other point raised, I confess I have been a little at a loss to understand either the meaning of the alteration or the argument by which that alteration was sought to be supported. I cannot doubt that the defence if proved is a good one. Whether it can be proved or not is a question to be determined at the trial, and if by the argument it is suggested (and so far as I understand it at all it seems to be suggested) that as a matter of law it cannot be proved, I repeat I do not even understand what is meant.

I think therefore the original order should be restored.

LORD MACNAGHTEN:—

My Lords, I concur in the motion which has been proposed and in the reasons upon which it is founded.

LORD MORRIS:—

My Lords, I have had the advantage of reading the judgment of the Lord Chancellor, and I may say that I entirely concur in it and could not hope usefully to add anything.

Order of the Court of Appeal reversed so far as appealed from and judgment of the Queen's

H. L. (E.)
1893

British South Africa Company v. Companhia de Moçambique.

Bench Division restored with costs here and below; cause remitted to the Queen's Bench Division.

Lords' Journals 8th September 1893.

Solicitors for appellants: *Hollams, Sons, Coward, & Hawksley.*

Solicitors for respondents: *Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1893
June 15.

M. CARSWELL . . . . Appellant;

and

R. G. COLLARD. . . . . Respondent.

THE "VICTORIA."

Ship, Hire of—Right of Shipowner to rescind Contract—Damages.

THIS appeal from the First Division of the Court of Session, Scotland, affirming the decision of the Lord Ordinary, turned entirely upon the question of fact whether the acts and conduct of the pursuer, the hirer of a ship, were such as to entitle the defender, the shipowner, to rescind the contract. The decision involved no general principle of law whatever. It is, therefore, enough to say that the House (Lord Herschell, L.C., and Lords Watson, Ashbourne, Macnaghten, and Shand (Lord Morris dissenting)), without hearing the respondent, affirmed the judgment of the Court of Session (1), for the reasons there given, and dismissed the appeal with costs.

Bigham, Q.C., and *R. L. Orr* (of the Scotch Bar), for the appellant.

Salvesen, and *G. L. Crole* (both of the Scotch Bar), for the respondent.

Agents for appellant: *Deacon, Gibson, & Medcalf, for Simpson & Marwick, W.S., Edinburgh,* and *Smillie & Blyth, Glasgow.*

Agents for respondent: *Learoyd, James, & Mellor, for W. B. Rannie, S.S.C., Edinburgh.*

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(1) 19 Court Sess. Cas. 4th Series (Rettie), 987.

[HOUSE OF LORDS.]

H. L. (Sc.)
1893
June 22.

A. W. RIXON . . . . APPELLANT;

AND

EDINBURGH NORTHERN TRAMWAY COMPANY AND OTHERS . . . . . RESPONDENTS.

Company—" Watering" Stock—Alleged Fraudulent Agreement by Directors who were interested in another Company—Issuing Shares at a Discount—Plea not raised on Record—Concurrent Judgments on a Question of Fact.

THIS appeal from the First Division of the Court of Session affirming the interlocutor of the Lord Ordinary (1), involved the decision of no general principle of law, it being a question of fact whether a contract dated the 15th of June, 1888, of the respondent company was fraudulent and knowingly a bad bargain. The Patent Cable Corporation held a majority of the respondent company's shares for work done. These shares with other securities they mortgaged to the Debenture Corporation for about £40,000 in cash. The Debenture Corporation assigned this mortgage and these securities to the Assets Realisation Company, who thus became creditors of the Patent Cable Corporation for £43,314. The respondent company concluded the agreement of the 15th of June with the sub-contractors, Dick Kerr & Co., to complete the unfinished section of the respondent company's tramway and pay debts to the extent of £3000 for a contract price of £75,000, £60,000 to be paid in £10 shares, and £15,000 in debenture mortgages. The nature of the alleged fraudulent scheme which the appellant, a shareholder in the respondent company, sought to prove being that Dick Kerr & Co. had secured their contract on too favourable terms, it being proved that the maximum value of the work actually to be done was only £25,000. Secondly, that this contract was given to Dick Kerr & Co. in consideration of their agreeing on the 22nd of May, 1888, to become the purchasers of the securities held by the Assets Company for the sum of £43,314, that sum being sufficient to repay the Assets Company the amount of their debt due from the Patent Cable Corporation; but being alleged to be considerably more than the real value of the securities held. And it was further alleged that the Assets Company, who held under their mortgage a majority of the shares in the respondent company, had appointed their own nominees to be directors to the respondent company, and were thus enabled to give the contract in question to the contractors on too favourable terms in order to obtain payment of their own debt.

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(1) 16 and 18 Court Sess. Cas. 4th Series (Rettie), respectively, 653, 264.

Appellant's counsel also raised a question as to the power of the respondent company to issue shares at a discount; but there being no allegation to this effect raised on the record, and the fact that the appellant refused to amend his record when given the opportunity in the Court of Session, the House objected to the question being argued; and declined to give any judgment upon the point.

Haldane, Q.C., and *Methold*, for the appellant.

A. Graham Murray, Q.C., and *C. K. Mackenzie* (both of the Scotch Bar), for the respondents.

The HOUSE (Lord Herschell, L.C., and Lords Watson, Ashbourne, Morris, and Shand), without hearing the respondents' counsel, affirmed the decision of the Court of Session, for the reasons that it had not been shewn that the concurrent judgments of the Courts in Scotland on a question of fact were erroneous, and, apart from that, it had not been shewn that there had been any fraud practised or that a bad bargain had been from interested motives intentionally made.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 22nd June, 1893.

Agent for appellant: *A. W. Rixon, for A. & G. V. Mann, S.S.C., Leith.*

Agents for respondents: *Linklater & Co., for Graham, Johnston, & Fleming, W. S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
1893
July 8, 29.

MILSON . . . . APPELLANT;

AND

CARTER . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Security for Costs—Appeal dismissed under Rule V. of the Order of 1853*—Correction of Accidental Error in Order of Court.*

Where an appeal to Her Majesty had been admitted in the Supreme Court and security deposited therein for costs to abide the judgment of Her Majesty, but the appeal was dismissed for want of prosecution under Rule V. of the Order of 1853:—

Held, that the respondent should apply to the Supreme Court to correct its order by directing, in accordance with its manifest intention, that costs should abide the result of the appeal; and, in the event of such application being refused, should apply for special leave to appeal from such refusal.

Hatton v. *Harris* ([1892] App. Cas. 547) approving *Mellor* v. *Swire* (30 Ch. D. 239) followed.

THIS was a petition by the respondent under the circumstances stated in the opinion of their Lordships for a summons directed to the appellant to answer the prayer thereof, which was to the effect (1.) that £23 19*s.* 9*d.*, being the petitioner's certified taxed costs incidental to the appellant's motion in the Supreme Court for leave to appeal and to the preparation of the transcript record, be paid to the petitioner out of £150, the amount of security for costs deposited in that Court by the appellant; (2.) that the costs incidental to the appeal and to this petition be taxed, and the certified amount be paid to the petitioner out of the balance of the said £150; (3.) that the residue of the said £150 be paid to the appellant, or that the appeal should be dismissed with costs or for other relief.

Isaacs, for the petitioner, said that the application had been rendered necessary by the Court having adopted an unusual form of order. Instead of directing that costs secured should abide the result of the appeal, it directed that they should be dealt with as the Judicial Committee should think fit. As no direction had been given by the Committee, the Supreme Court thought that it had no jurisdiction to deal with the fund. [LORD HOBHOUSE:—There is no appeal before us in which any order can now be made.] Still this application is competent: see *Viney* v. *Chaplin* (1) and *Fritz* v. *Hobson* (2). [LORD MACNAGHTEN:—Those cases decide that liberty to apply is always in gremio, i.e., that an order of Court carries with it liberty to apply in respect of it: but should not that argument be addressed to the Supreme Court? LORD HOBHOUSE:—Is there any precedent for this Committee making an order after the appeal has ceased to be before them?] See *Rajündernarain Rae* v. *Bijai Govind Sing* (3), and cases cited on page 133.

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* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

The opinion of their Lordships was delivered by

1893
July 29.

LORD HOBHOUSE:—

This is an application on the part of the respondent in the appeal now dismissed of *Milson* v. *Carter* asking for an order directing the appellant to pay the costs of and incidental to the appeal, and also the costs of the present application.

The appeal stood dismissed without special order under Rule V. of the Order in Council of the 13th of June, 1853, for want of prosecution.

On that rule taking effect and on the dismissal being notified by the registrar of the Privy Council in the usual way the respondent applied to the Supreme Court for payment of his costs. The appellant took the objection that the order of the Supreme Court granting leave to appeal made no provision for the case which had actually occurred. The Chief Justice, after consulting with the other judges, expressed the opinion that the Supreme Court had no jurisdiction to make any order as to the costs, and that the application should have been made to this Board.

It seems that when the order granting leave to appeal was

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(1) 3 De G. & J. 282.
(2) 14 Ch. D. 542.
(3) 1 Moore's P. C. 117.

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made the Order in Council of the 13th of June, 1853, was overlooked. The order of the Court, which is dated the 26th of September, 1890, merely directed that the costs of both parties of and incidental to the motion for leave to appeal and the preparation of the transcript record should be taxed, and that such costs should abide the judgment of Her Majesty in Council in the said appeal in that behalf. It omitted to add the words, "or the result of the appeal, in case the appeal shall be dismissed for want of prosecution," or any similar words which would have made the order complete.

The rule under which appeals stand dismissed without special order has been in force for forty years, and their Lordships are informed by the registrar that this is the first occasion so far as he is aware on which any difficulty as to costs has occurred. It is obvious that the omission to provide for the case of dismissal under the order of June, 1853—a case of constant occurrence—must have been an accidental omission for which the registrar of the Supreme Court, or perhaps the respondent himself, is to blame. It is impossible to suppose that the Court could have intended to give the appellant an opportunity of shuffling out of his just liability by making default in the prosecution of his appeal.

Their Lordships do not doubt that the Court has power at any time to correct an error in a decree or order arising from a slip or accidental omission, whether there is or is not a general order to that effect. A recent instance of the exercise of this power occurred in the case of *Hatton* v. *Harris* before the House of Lords (1), where an error arising from an accidental omission was corrected after the lapse of forty years. The House of Lords in that case approved the views expressed by the Court of Appeal in *Mellor* v. *Swire* (2).

Their Lordships observe that the fund which was intended to be a security for the costs of the appeal is still in Court. It cannot be dealt with except by the order of the Supreme Court. It can only be dealt with in accordance with the real meaning and intention of the order of the 26th of September, 1890, by first correcting the slip in that order. The existence of this fund in

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(1) [1892] App. Cas. 547.

(2) 30 Ch. D. 239.

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the hands of the Court would seem to remove any difficulty that could possibly be suggested in the way of an application directed to that purpose.

Unfortunately the respondent did not take the proper course of applying to the Supreme Court to correct the accidental omission in the order granting leave to appeal. If he had done so no doubt the mistake would have been put right as a matter of course.

Their Lordships will allow this application to stand over with liberty to amend, so that in the very improbable event of any difficulty occurring in correcting the order of the 26th of September, 1890, the respondent may be in a position to apply for special leave to bring up that order on appeal, together with any order that may be made on any application which the respondent may be advised to make with the view of having the slip corrected.

It will be the duty of the respondent forthwith to communicate this opinion to the appellant, so that if so advised he may by timely submission prevent any further costs in this very idle dispute.

Solicitors for petitioner: *Spyer & Sons.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1893
July 24.

MACDONALD AND ANOTHER . . . . . APPELLANTS;

AND

SCOTT (OR HALL) AND OTHERS . . . . RESPONDENTS.

Marriage Contract—Provision to Issue of Children—Whether Contractual or Testamentary.

A conveyance in an ante-nuptial contract of marriage in favour of the children of the marriage and the issue of such children is not revocable by the spouses as regards the issue of the children.

So *held*, reversing the decision of the Court of Session (19 Court Sess. Cas. 4th Series (Rettie) 567).

APPEAL from an interlocutor (1) of the First Division of the Court of Session, Scotland, in an action of multiplepoinding and exoneration, raised at the instance of Mrs. Jane C. Scott or Hall and others, as individuals and trustees, the respondents, against Andrew Hall Macdonald and his father as his administrator in law, the appellants.

The late Andrew Hall of Calrossie and Mrs. J. C. Scott or Hall, his wife, entered into an ante-nuptial contract of marriage on the 7th of May, 1849, which was, inter alia, as follows—

In contemplation of which marriage the said Andrew Hall hereby assigns, dispones, "and makes over to and in favour of the said Jane Chisholm Scott, his promised spouse, in life-rent for her life-rent use allenarly, subject to the restrictions in the events after mentioned, and to the child or children of the said intended marriage, and the issue of the bodies of such children, whom failing, to the said Andrew Hall's own heirs and assignees whomsoever, in fee, all and sundry lands and heritages, goods, and gear, debts, and sums of money, household furniture of every description, and in general the whole estate and effects, heritable and moveable, at present belonging or which may happen to pertain and belong to him at the time of his death in any manner of way, with the whole writs and evidents of the

(1) 19 Court Sess. Cas. 4th Series (Rettie), 567.

said estate, grounds, vouchers, and instructions of the said debts themselves, and all that has followed or may be competent to follow thereon: but declaring always that the said Jane Chisholm Scott shall be bound and obliged out of said life-rent to maintain, educate, and support the children of the said intended marriage till they respectively attain the age of majority or be married; declaring, however, that in case the said Jane Chisholm Scott shall enter into a second marriage during the existence of the children of said marriage or the issue of the bodies of such children, then and in that event the said life-rent hereby provided to her shall cease and determine: and farther, declaring that in case there be no children procreated of the said intended marriage, or if there shall be no living child or children at the dissolution of the said intended marriage, then the said life-rent provision of the estate and effects of the said Andrew Hall in favour of the said Jane Chisholm Scott shall be restricted, and the same is hereby restricted, to a free yearly annuity of £150 sterling; and which free yearly annuity of £150 the said Andrew Hall hereby binds and obliges himself, and his heirs, executors, and successors, whomsoever, to pay to the said Jane Chisholm Scott, but with and under this condition and provision always, as it is hereby expressly provided and declared, that in case the said J. C. Scott shall enter into a second marriage, then, and in that event, the said annuity of £150 hereby provided shall be restricted to the sum of £50, &c.; and which provisions above written, conceived in favour of the said J. C. Scott, under the conditions above expressed, she hereby accepts of in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she jure relictæ, or otherwise could ask, &c., of the said Andrew Hall or his heirs, &c., by and through his death in case she shall survive him, or that her nearest of kin could demand of him through her death, in case he should happen to survive her. And it is further declared that in case there shall be more than one child of the said intended marriage it shall be lawful to and in the power of the said Andrew Hall, at any time of his life to divide and proportion, as he shall think proper, among the said children, the above written provisions in their favour, and failing of such division the said provisions shall belong to and be divided among the said children equally, share and share alike, and to the issue of such of them as may predecease before the said provisions become payable: and also it shall be in the power of the said Andrew Hall by any deed or writing under his hand to appoint and provide such sum or sums as he may think proper to be advanced and paid out of the said means and estate to any of the said children, at such time, and in such manner as he may appoint, in which case the life-rent provision in favour of the said J. C. Scott shall suffer restriction corresponding to the amount of the sums so advanced. For which causes and on the other part, the said J. C. Scott hereby assigns and makes over to the said Andrew Hall and his heirs, &c.," "in general the whole estate now belonging or shall belong to her during the marriage, other than the provisions before specified." Then followed a clause that although the marriage was dissolved within a year and a day without a child being born, yet the contract was to have full force and effect. "And it is also hereby agreed that all manner of action and execution shall pass upon this contract for implement thereof in favour of the said Jane Chisholm Scott and the children of the marriage, at the instance of all or any one of the persons after mentioned."

This marriage contract was found among Mr. Hall's papers at his death. There was only one child of the marriage, a daughter —the late Mrs. Isabella Hall or Macdonald, who died on the 25th of November, 1877, survived by her father and mother, and one child, the appellant Andrew Hall Macdonald.

Andrew Hall died on the 19th of February, 1891, survived by his wife. He left a trust disposition and settlement dated the 4th of March, 1885, and a codicil of later date. By this settlement he conveyed his whole estates, heritable and moveable, to his wife and to certain others as trustees for the following purposes:—Mrs. Hall to have the life-rent of the truster's whole estate, and on her death a legacy of £5000 was to be paid to the appellant Andrew Hall Macdonald; legacies of £500 were to be paid to each of the trustees other than Mrs. Hall; and the residue of the estate was to be divided among the nephews and nieces of the truster and his wife. Andrew Hall died possessed of property valued at £56,000, while at the date of the marriage his property amounted in value to £6000. In the action, the appellant Andrew Hall Macdonald claimed that in respect of the marriage contract, he was entitled to the whole estate left by Andrew Hall his grandfather, subject to the annuity in favour of Mrs. Hall. The respondent Mrs. Hall claimed a life-rent of the whole estate on the footing that the estates fell to be administered under the trust disposition. The other respondents, as individuals, claimed the legacies of £500. This claim was afterwards amended to the effect of claiming the whole estate in order that it might be administered in terms of the trust disposition.

The Lord Ordinary (Kincairney) on the 19th of November, 1891, gave effect to the contention of the appellants, holding that the estates fell to be disposed of under the marriage contract, which could not be revoked. He also held that the widow, Mrs. Hall, was only entitled to an annuity of £150.

The First Division of the Court of Session recalled the Lord Ordinary's interlocutor on the 8th of March, 1892 (1), and gave judgment in favour of the claim by Mrs. Hall and the trustees, holding that the estates fell under the trust disposition and settlement; the provisions of the marriage contract, in their opinion, and as regards the appellant Andrew Hall Macdonald being testamentary and revocable, and had been effectually recalled by the trust deed.

During the hearing at the Bar, the question of the amount of the wife's life-rent was opened, but the appellants' counsel informed the House that they were authorized, if the opinion of the House was in their favour, to renounce that question, and to leave to the grandmother the whole life-rent, she undertaking to support the appellant, the grandson, during her life.

On appeal,

1893. June 6, 8, 9. The *Lord Advocate* (*J. B. Balfour*, Q.C.), and *A. Graham Murray*, Q.C. (of the Scotch Bar), for the appellants:—

The provisions of the marriage contract in favour of the issue of the children were pactional and irrevocable. The issue was within the consideration of the marriage, and it was not competent for either or both of the spouses to revoke the contract. Under the words "issue of the bodies of such children," the appellant A. H. Macdonald became heir of the marriage. The Court of Session have held that the bargain did not extend beyond children, but grandchildren are equally the result of the marriage, and cannot be considered as strangers: Bankton, 1, 5, 9. The respondents quote Bankton, 1, 5, 15; but that learned author was not there referring to immediate children only, but to the whole family, and it is only when he gets beyond that larger view of children that he treats of strangers.

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(1) 19 Court Sess. Cas. 4th Series (Rettie), 567.

Erskine (1) also used the term "issue" as meaning the whole descendants of the marriage. The respondents rely on *Pretty* v. *Newbigging* (2). If that case is at all in point, it was recognised there that a grandchild was within the pactional consideration of marriage (3). The Court of Session founded on *Edwardes* v. *Hughes* (Dec. 19, 1890) (4); but that case was reversed in this House (5). On the other hand, *Arthur and Seymour* v. *Lamb* (6) is in the appellants' favour as to the construction to be put upon the word "children" in marriage contracts.

[LORD WATSON referred to *Stewart* v. *Graham* (in 1744) (7); *Macneil* v. *Macneil's Trustees* (1826) (8); and *Macleod* v. *Macleod* (1828) (9).]

In *Stewart* v. *Graham* (7) the words "heirs of the marriage" were held to extend to children in the second degree. [They also referred to *Oswald* v. *Boyd* (18 June 1680) (10); *Young's*

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(1) Erskine, 3, 8, 38, 39.

(2) 16 Court Sess. Cas. 2nd Series (Dunlop), 667.

(3) 16 Court Sess. Cas. 2nd Series (Dunlop), at pp. 671, 696, 697.

(4) 18 Court Sess. Cas. 4th Series (Rettie), 319, at p. 332.

(5) [1892] A. C. 583.

(6) 8 Court Sess. Cas. 3rd Series (Macpherson), 928, and a fuller report in 42 Sco. Jur. 542.

(7) Mor. 13010. Elchies, Mutual Contract, No. 20. On appeal, 1 Pat. 364.

(8) 4 Court Sess. Cas. 1st Series (Shaw), 396.

(9) 6 Court Sess. Cas. 1st Series (Shaw), 1043.

(10) Mor. 2948; 2 Stair, 771.

Trustees v. *M'Nab* (1); *Mackie* v. *Herbertson* (2); *De Mestre* v. *West* (3) in the Privy Council.]

The *Solicitor-General for Scotland* (*Asher*, Q.C.), and *Walton* (of the Scotch Bar) for the respondents:—

The marriage contract does not disable the husband from disposing of his estates by trust disposition, there being no children alive at his death. In all these cases the question is—what was intended by the contract? if the parents meant that the children should not have an onerous right against themselves, the law must give effect to such meaning. On a dissolution of the marriage, each child has a right to legitim, but the privilege of persons about to marry is to displace that legal right and exclude it by provisions made in favour of the children. These provisions are onerous and consequently irrevocable. But the position of grandchildren is quite different; they have no right in the estates of their grand-parents. There is therefore no onerosity in regard to provisions for them. Indeed, the irrevocability of provisions to children arises solely from the principle of onerosity, and there is no case which decides that the parent cannot revoke them, where they are not a discharge of legitim.

[LORD WATSON referred to *Lord Advocate* v. *Sidgwick* (4). The leading consideration of the contract is marriage.]

The law makes the child a creditor and not the grandchild. That is the line of division between them. Light is thrown on the question by those cases which have decided that a child may contract with its father and discharge its provision, and thus cut off any eventual right of grandchildren: see *Routledge* v. *Carruthers* (5). *Macleod* v. *Macleod* (6); *Macneil* v. *Macneil* (7); and *Stewart* v. *Graham* (8), do not seem to apply; and in *Arthur*

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(1) 10 Court Sess. Cas. 4th Series (Rettie), 1165.

(2) 9 App. Cas. 303.

(3) [1891] A. C. 264; Wheeler's P. C. Law, 816.

(4) 4 Court Sess. Cas. 4th Series (Rettie), at p. 828.

(5) 19 May, 1812. 16 F. C. 572; 4 Dow. 392; 2 Bli. 692; 6 Pat. 597.

(6) 6 Court. Sess. Cas. 1st Series (Shaw), 1043.

(7) 4 Court Sess. Cas. 1st Series (Shaw), 396.

(8) Mor. 13010. Elchies, Mutual Contract, No. 20. On appeal, 1 Pat. 364.

and Seymour v. *Lamb* (1), the point was not involved in the questions which the English Court required the Scotch Court to answer. As to the legacies to the trustees, there must be some persons authorized to carry out the marriage contract.

The Lord Advocate replied.

Judgment after consideration.

LORD HERSCHELL, L.C.:—

My Lords, in this action of multiplepoinding a contest arose with regard to the rights or alleged rights acquired under a marriage contract of the 7th of May, 1849. By that marriage contract it was "contracted, and agreed, and matrimonially ended between the parties following, viz.: Andrew Hall, farmer, Scribercross, on the one part, and Miss Jane Chisholm Scott, daughter of John Scott, Esquire, of Ashtrees, on the other part, in manner following: that is to say, the said parties have accepted of each other, and hereby accept of each other for lawful spouses, and promise to solemnize the bond of marriage with all convenient speed, agreeably to the rules of the Church. In contemplation of which marriage the said Andrew Hall hereby assigns, disposes, and makes over to and in favour of the said Jane Chisholm Scott, his promised spouse, in life-rent for her life-rent use allenarly, subject to the restrictions in the events after mentioned, and to the child or children of the said intended marriage, and the issue of the bodies of such children, whom failing to the said Andrew Hall's own heirs and assignees whomsoever in fee, all and sundry," his "lands and heritages, goods and gear, debts and sums of money, household furniture of every description, and in general" his "whole estate and effects."

Andrew Hall died leaving his wife surviving, and leaving surviving also an only child of a daughter of the marriage; there were no other children of the marriage except this daughter.

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(1) 8 Court. Sess. Cas. 3rd Series (Macpherson), 928, and a fuller report in 42 Sco. Jur. 542.

My Lords, the first and the main question which arose in the action was whether the contract of marriage gave to the grandson whom I have mentioned a pactional and onerous right which could not be defeated by a testamentary disposition of his grandfather, or whether the disposition in favour of the issue of the children of the marriage was gratuitous only, so that it could be defeated by a testamentary disposition of the truster. Now it is well settled that a disposition made in favour of the children of the marriage under a marriage contract is pactional and not gratuitous. A disposition such as this of the whole of the truster's property does not confer, of course, an onerous right as against his creditors; but it is certain that as regards the children it does confer an onerous and pactional right in their favour, so as to preclude his making any testamentary disposition which would defeat that right. It is equally well settled that a disposition in favour of a stranger to the marriage does not under ordinary circumstances confer any pactional right, but is to be regarded merely as gratuitous, so that notwithstanding the marriage contract a good disposition may be made to any other person which would defeat the right of the stranger who was, under the disposition, to take benefits. The question is whether grandchildren are in the same position as children, so that the dispositions in their favour are pactional, or whether their position is that of strangers, so that the disposition would be regarded as gratuitous only.

The learned judges in the Inner House have determined that in the present case the disposition in favour of the grandchildren was gratuitous merely; and, therefore, Andrew Hall, having by a testamentary disposition disposed of the whole of his estate in life-rent to his widow, and subject to that life-rent having given to the grandson of the marriage £5000 only, and disposed of the rest of the estate amongst collateral relations, this testamentary disposition has been held effectual to deprive the grandson of the marriage of the rights given to the issue of the bodies of the children of the marriage in the marriage contract, and to limit the grandson's right to the sum of £5000 only, and to secure to the widow absolutely her life-rent in the whole of the estate. The latter point was of importance, inasmuch as under the marriage contract, by provisions which I do not think it necessary to trouble your Lordships with, the life-rent of the widow was reduced to a sum of in one event £150 a year, and in other events £50 a year; and a discussion arose in the action, upon which there was a decision in the Court below as to whether the events had happened which restricted her life-rent to one or the other of those sums. It is unnecessary that your Lordships should pronounce any decision upon that point, inasmuch as it was agreed at the Bar on behalf of the appellant that if it should be held that he took a right under the marriage contract which could not be defeated, his grandmother should receive in life-rent the whole of the property. He had no desire to contend before your Lordships that events had happened which reduced her right to one or other of the smaller sums which I have mentioned.

The sole question, therefore, for determination is, as I have said, whether the right of the grandson, under the words in the marriage contract, was pactional or gratuitous. My Lords, there can be no doubt that according to the law of England a stipulation on behalf of a grandchild of the marriage would be regarded as within the consideration of marriage, and as completely binding as any stipulation in favour of a child. But, of course, it is necessary in considering the question now before your Lordships, to put aside entirely any views derived from a consideration of the law of England, and to devote attention exclusively to what has been laid down by text-writers, or is to be found in decisions as to the law of Scotland.

Looking at the matter apart from authority, I confess that none of the arguments which I heard at the Bar satisfied me that there was any sound ground for holding that provisions in favour of the issue of children of the marriage were to be regarded as analogous to stipulations in favour of strangers, and were not within the principles which protect stipulations in favour of the children of the marriage, and treat them as onerous and not gratuitous. Great reliance was placed in the argument at the Bar upon passages to be found in Bankton and Erskine. The passage relied on in Bankton is this: "Though the children are creditors in such provisions with respect to gratuitous deeds made in contravention thereof, yet this extends not to the substitutes failing children, for the children only are in obligatione in whose favour the provision as binding was made, the intention of parties being only to secure their interest; but other substitutes are only in destinatione heirs by simple destination, and so may be disappointed of their hope of succession at pleasure as any other heirs by naked destination." Now, my Lords, I am not satisfied that in that passage, upon which so much reliance is placed, there was any intention on the part of the learned writer to draw a distinction between children and the issue of children, who are descended from and are the fruits of the marriage. A distinction is drawn between children and those who are strangers, but I do not think there was any intention by the use of the word "children" in the passage which I have read, to exclude grandchildren, and to indicate that in the case of grandchildren no onerous right is created.

The passage in Erskine upon which reliance was placed runs thus: "The father lies under no degree of restraint in favour of the substitutes who are called by the marriage contract after the issue of the marriage, and who acquire no right by such substitution." It seems to me that in the natural meaning of the words "issue of the marriage," grandchildren are included as much as children. I do not accede to the argument that the primary meaning of "issue" is "children" only, and that it is departing from the primary meaning if in "issue of the marriage," you include the children of children. Therefore, as I read the passage in Erskine, so far from its favouring the view contended for on the part of the respondents, it really favours the view for which the appellants argued.

My Lords, it is certain that it is elsewhere laid down by Bankton that the heirs of the marriage take pactionally, and that Bankton, in the passage in which he refers to the rights which the heirs thus acquire, includes in "heirs" not merely the children, but the children of children.

It was said in the Court below, that the point was really determined in favour of the respondents by the decision of the Court of Session in the case of *Pretty* v. *Newbigging* (March 1, 1854) (1).

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(1) 16 Court Sess. Cas. 2nd Series (Dunlop), 667; 26 Sco. Jur. 338.

That, so far as I can see, was the only authority, apart from the text-writers to whom I have called attention, upon which reliance was placed by the Court below. In *Pretty* v. *Newbigging* (1), the question which arose was this: The person who made the settlement having died leaving a widow entitled to a life-rent and an only child, the question was whether, if the widow renounced her life-rent, the child could call for an immediate conveyance from the trustees. The point decided was that inasmuch as the terms of the contract did not shew any intention that this should not take place for the purpose of securing and continuing the life-rent to the widow, by the widow renouncing the life-rent the child was in a position to call upon the trustees for a conveyance. With all respect I am unable to see that the decision in the case of *Pretty* v. *Newbigging* (1) determines the point now before your Lordships. It appears to me that if it had been absolutely settled law that a grandchild took a pactional right just as much as a child, the decision in *Pretty* v. *Newbigging* (1) must have been precisely the same.

When the authorities on the other side are examined it appears to me that there are decisions of great weight which point in the contrary direction, and they lead me to a different conclusion from that arrived at by the Court below. I do not intend to detain your Lordships by any minute examination of those authorities, inasmuch as I have had an opportunity of reading the opinion which my noble and learned friend Lord Watson will presently deliver, and I entirely concur in the views which he will express as the result of his examination of the authorities; but I would say that there is one authority which appears to me most strongly to favour the view of the appellants. I do not suggest that the other authorities are not of the very greatest weight, which clearly shew that the rights acquired by the heirs of the marriage are acquired as much by the heir who is the son of the eldest son as by the eldest son himself, and that the settlor can no more defeat the right of his grandson, under a provision in favour of the heirs of the marriage, by a disposition in favour of younger children, than he can defeat the right of the eldest son. But the case which as it seems to me is perhaps, in respect of the inevitable inference from the decision, most strongly in favour of the appellants, is that of *Arthur and Seymour* v. *Lamb* (1). In that case the provision was in favour of the children of the marriage, but it was held by the Court of Session that where a child had died leaving a child surviving, the provision in favour of children of the marriage enured for the benefit of the grandchild, and that the right so obtained could not be defeated by a subsequent gratuitous disposition on the part of the settlor. My Lords, that decision proceeded upon the well-known rule of Scotch law which is known as the condition si sine liberis, by which the grandchild is regarded as obtaining the same right as the parent would have had. Now I quite agree with the view which my noble and learned friend Lord Watson entertains, that it would be strange indeed if by a disposition in favour of the children of the marriage a grandchild obtained a better right than would have been obtained by him or her if the disposition, instead of being in favour of the children of the marriage, had been in favour of the children of the marriage and their issue specifically mentioned. It seems to me to be only a logical conclusion from the decision in the case to which I have alluded that a grandchild must, under a disposition such as that with which your Lordships have to deal, have a right as well secured and as truly pactional as a child.

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(1) 16 Court Sess. Cas. 2nd Series (Dunlop), 667; 26 Sco. Jur. 338.

My Lords, I do not think I need trouble your Lordships with any further observations. I have thought it right to indicate the grounds upon which I have come to the conclusion that the judgment of the Court below must be reversed, although in truth I need hardly have added anything, except for the purpose of shewing that I have independently arrived at this conclusion, to the observations of my noble and learned friend Lord Watson in the opinion which he is now about to deliver.

LORD WATSON:—

My Lords, the late Andrew Hall, of Calrossie, was married, in May 1847, to the respondent, Mrs. Jane Chisholm Scott, or

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(1) 8 Court Sess. Cas. 3rd Series (Macpherson), 928; 42 Sco. Jur. 542.

Hall; and he died in February 1891. One child only was born of the marriage, who became the wife of the Reverend Colin Macdonald, and predeceased her father, leaving issue the appellant, Andrew Hall Macdonald.

In contemplation of their marriage, Mr. and Mrs. Hall entered into an ante-nuptial contract, by which he assigned and disponed the whole estate then belonging, or which might belong to him at the time of his death, to his promised spouse in life-rent, for her life-rent use allenarly, and to "the children of the said intended marriage, and the issue of the bodies of such children," whom failing, to his own heirs and assignees whomsoever, in fee. For these causes, Mrs. Hall, of the other part, conveyed to her future husband, absolutely, the whole estate then belonging, or which might pertain and belong to her during the subsistence of the marriage. In the event of there being more than one child of the marriage, Mr. Hall reserved power to divide and apportion among "the said children" the provisions made in their favour. Issue of children are not included in the power thus reserved; but it is declared that, "failing of such division," these provisions shall belong to and be divided among the said children equally, share and share alike, and to the issue of such of them as may predecease before the said provisions become payable."

I may observe here that issue of children are not called to the succession as substitutes, in the proper sense of that word. They are conditionally instituted, and take, if at all, in the first instance, and pari passu with surviving children. Whether they are meant to take as individuals, or as a class, is a matter which does not affect the questions raised in this appeal. My impression is that, in competition with children, they would only have been entitled to share per stirpes.

The life-rent provided to the widow, which was subject to restriction in certain events, is declared to be in full satisfaction of her legal claims; but, in the case of children, there is no exclusion or discharge of legitim. In circumstances other than those which have occurred that omission might have been of great advantage to immediate children. Any child to whom the father had apportioned less than his share of legitim could have elected to take the latter. Again, if Mr. Hall had only left moveable estate, and had been survived by one child and several families of grandchildren, that child could have claimed one-half of the whole succession, instead of the smaller share assigned to him by the marriage contract.

At the date of his marriage Mr. Hall appears to have possessed about £6000. At the time of his death the value of his estate, heritable and moveable, was about £56,000. I need hardly say that the increase of his means between these two periods could not alter his position towards descendants of the marriage, whose provisions under the marriage contract were pactional and not testamentary. On the 4th of March, 1885, he conveyed to trustees, by a testamentary deed, the whole estate of which he might die possessed, with directions to them, after payment of his debts, to convey the same to his widow in life-rent, for her life-rent use allenarly, and, on her decease, to realize and divide the fee. To the appellant he gave a legacy of £5000, burdened with conditions suspensive of its vesting, and requiring the appellant to assume the name of Hall. The whole remainder was bequeathed to collateral relations of the truster, and other strangers to the marriage.

Provisions to the issue of a marriage may be so conceived as to give them either a right of fee, or a jus crediti, which will vest as soon as they come into existence, or, as in this case, to give them a spes successionis which will not open until the death of the settlor. It is not disputed that all such provisions made by parents intuitu matrimonii are onerous and obligatory, in so far as immediate children of the marriage are concerned. But the effect of the obligation differs in each of these cases. Provisions of fee to children on their birth, through the medium of a trust or otherwise, need not be referred to, because they throw no light upon this case. When the child takes a proper jus crediti, he can compete with other onerous creditors, and can restrain his parents, by legal diligence, from alienating or burdening the subjects destined to him. When the provision is of all the estate of which the parent may be possessed at the time of his death, the parent remains full owner, and may during his lifetime squander his entire means if he thinks fit.

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The interest of the child is not that of a creditor, but of an heir. Yet, inasmuch as the provision is contractual, his spes successionis is held to consist, not in destinatione merely, but also in obligatione; so that his parent cannot, by any gratuitous deed, create rights which will impair or defeat his spes.

If Mr. Hall had died without leaving a settlement, the appellant, being the only living descendant of the marriage, would admittedly have taken his whole succession as institute under the marriage contract, whether his right was onerous or gratuitous. The respondents, including Mrs. Hall, as trustees under the settlement of March, 1885, claim the succession in preference to him upon the ground that the destination to issue of the bodies of children of the marriage was not a contractual but a testamentary provision, and was therefore competently revoked by the gratuitous disposition which forms their title.

In these circumstances, two issues, which are purely legal, were presented to the Courts below. Is the marriage contract provision in favour of grandchildren pactional and obligatory? If so, is the widow's life-rent, in the events which have occurred, restricted to an annuity of £150? The Lord Ordinary (Kincairney) answered both issues in the affirmative; but the learned judges of the First Division reversed his decision upon the first issue, so that it became unnecessary for them to decide the second. At the Bar of the House, the appellant, with great propriety, intimated that, in the event of your Lordships reversing the judgment of the Inner House, he did not intend to dispute his grandmother's right to retain the full life-estate provided to her by the marriage contract. That point has accordingly been withdrawn from our judicial cognizance.

In explanation of the grounds upon which the decision of the Inner House proceeded, I cannot do better than refer to the rule laid down by Lord Kinnear, which was repeated, in different language, by Lords Adam and M'Laren. His Lordship said (1): "The general rule which is applicable to marriage contracts is, that when the husband settles his property or any part of it upon the wife and children of the marriage, with a destination to other persons on the failure of children, there is no jus crediti given to any one as against him and his heirs, except to the wife and to the children of the marriage, and any clauses of eventual destination to strangers and remoter heirs must be regarded as mere gratuitous destinations, which create no obligation against the granter and his heirs, and which he may therefore defeat at his pleasure." I do not think that the rule thus stated can be impugned, except in so far as it is meant to include heirs or descendants of the marriage, of remoter degree than children, in the same category with heirs ascendant or collateral, and other strangers to the marriage. His Lordship then goes on to say: "The law is so laid down by Erskine and Bankton, and it has received effect in a series of decisions to which, I think, it quite unnecessary to refer in detail, both because they are very familiar, and because the principle is nowhere more clearly stated than by Lord Watson in the recent case of *Mackie* v. *Herbertson* (1)."

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(1) 19 Court Sess. Cas. 4th Series (Rettie), at p. 573.

I take this opportunity of stating that, in my opinion, the recent case thus referred to, which the Lord Ordinary regarded as an authority against the rule adopted by the Inner House, has really no bearing upon the question now raised for our decision. The appellants in that case were strangers to the marriage, being the children of the wife by a former husband, and their provisions would unquestionably have been revokable and revoked, if they had been within the scope of the rule. But they were neither substitutes nor conditional institutes; they were directly instituted along with the children of the marriage; and the judgment of the House in their favour went upon the view taken by Lord Rutherfurd Clark in the Court below, viz.: that the parent was completely divested, and a beneficial fee vested in them by a delivered conveyance to trustees for their behoof. I regret that the language which I used in *Mackie* v. *Herbertson* (1) should have misled Lord Kinnear as to the interpretation which I put upon the rule as bearing upon this case. It was not my intention to discuss the rule in that bearing, and the construction now attributed to me is one which never occurred to me at the time. I understood then, as I do now, that the expression "issue of the marriage" as it

(1) 9 App. Cas. 303.

occurs in the text of Mr. Erskine, which I cited, was meant by the learned author to embrace every person lineally descended of the marriage for whom a provision is made by the spouses, and that the only persons whose provisions are to be regarded as gratuitous and defeasible at will are relations not descended of the marriage, and strangers in blood.

The general rule of the law of Scotland is, that every stipulation in a mutual agreement is binding upon the person obliged, whether it be conceived in favour of the other contractor or of a third party. The exception in the case of marriage contracts, which are the most onerous of all, appears to rest upon the assumption that in instruments of that kind the parties are merely contracting with reference to their matrimonial union and its consequences; and that stipulations which travel beyond these objects, and have no relation to their marriage, though contractual in form, are, primâ facie, not meant to be so in substance. If the question were an open one, I think it would be difficult to find a satisfactory reason for holding, that in contracting with a view to marriage the spouses have not in contemplation the interests of their grandchildren and remoter heirs of the marriage, as well as the interests of their children. I conceive, however, that it is not an open question, and that its decision must turn, not upon considerations of general policy, but upon Scotch authorities.

The text of Bankton (Inst. 1, 5, 9) is to the effect that, "Where one provides his estate, in his contract of marriage, to heirs whatsoever of the marriage, he cannot, in prejudice of his eldest son, or of his issue, dispone or tailzie the estate in favour of his own second son, though such provisions are chiefly intended to debar the providing the estate to children of another marriage." There can be no clearer authority for the proposition that a grandchild, called as a conditional institute, in the character of an heir whomsoever of the marriage, has an interest which his grandfather cannot gratuitously defeat, even though his object be to prefer a child whose right of succession is onerous.

The language used by Mr. Erskine in expressing the rule is less precise than that of Bankton. He does not speak of "heirs of the marriage," but of "issue of the marriage" and "issue of the wife," both of which are flexible terms, which may either signify immediate children or remoter descendants of the marriage. The reason which he assigns for the rule appears to me to indicate that he meant to use the words in their wider sense. It is this: "The wife and her relations, who are the only contractors with the husband, are not interested in the succession, except in so far as it is provided to the wife's issue." I can hardly conceive that Mr. Erskine should have meant to affirm that the wife and her relations have no interest to stipulate that the provision to her children shall, on their predecease, devolve upon her grandchildren, who are her own heirs, in preference to the heirs and nominees of her husband."

I, therefore, construe Mr. Erskine's text as stating the same rule which is laid down by Bankton. Assuming that he did understand the rule which he lays down in the sense attributed to him by the First Division, I should regard it as a matter of little consequence, because Bankton's rule had been judicially recognised and applied, not only by the Court of Session, but by this House, many years before Erskine wrote; and authority of that kind cannot be impaired by the dicta of an institutional writer, however eminent.

One decision relied on by the First Division as directly establishing the doctrine that "the issue of the children of the marriage are in this respect in the same position as any other gratuitous substitutes," is the well-known case of *Pretty* v. *Newbigging* (1). In my opinion, it has no bearing whatever upon the interests of grandchildren and remoter descendants. The marriage had been dissolved by the death of the father, leaving a widow and no descendant except one unmarried child; and the only question raised for decision was, whether, upon the widow's renunciation of her life-rent, the child was entitled to demand a conveyance of the fee from the marriage contract trustees. It was adjudged, by a majority of the whole Court, that the child was so entitled, because, in the first place, the contract did not require that the trust should be kept up for the protection of the widow's life-rent, and, in the second place, the beneficial fee had vested in the child.

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(1) 16 Court Sess. Cas. 2nd Series (Dunlop), 667; 26 Sco. Jur. 338.

Stewart v. *Graham* (1), which was decided here in the year 1744, is an authority much more in point. By an ante-nuptial contract the wife had conveyed her estate to the husband, who obliged himself to provide all heritable and moveable estate then belonging to him, and which he should happen to conquest and acquire during the time of the said marriage, "to the heirs to be procreate of the said marriage in fee." The eldest and second sons of the marriage predeceased their father, the eldest without issue, and the second leaving one child, a daughter. The father was survived by his granddaughter and several children. Before his death he executed an entail of his lands, passing over his granddaughter, and calling the third son of the marriage, and the heirs male of his body, in the first place. The Court of Session held (2) that the granddaughter took, under the marriage contract, a right preferable to that of the institute and heirs of tailzie, and set aside the entail as being in fraudem tabularum. On appeal their judgment was affirmed by the House. I have examined the printed papers in the appeal, and find that the appellant's case contains no plea to the effect that the granddaughter's provision was gratuitous, the reasons stated against the judgment being that, upon a just construction of the marriage contract, the father, being full fiar, had power to divide the estate among the heirs of the marriage, and could, for sufficient causes (which were said to be proved) exercise that power, by displacing the issue of his second son and preferring his third son. From that circumstance I do not infer that the plea urged for the respondents in this case was overlooked, but that the rule laid down by Bankton as to the obligatory character of provisions to the heirs of a marriage was understood by the profession to be settled law.

MacLeod v. *MacLeod* (3), which was decided by the First Division in the year 1828, although not so near in its circumstances to the present case as *Stewart* v. *Graham* (1), affords a strong illustration of the same principle. In that case the father, by ante-nuptial contract, disponed the estate of Raasay to himself and to the sons to be procreated of the marriage successively in their order of seniority, and the heirs whomsoever of their bodies respectively, whom, failing to the sons, to be procreated by him in any subsequent marriage, whom failing to the daughters of the intended marriage and other substitutes. He reserved power to affect the estate with entail fetters, but not to alter the order of succession. He subsequently executed a deed of tailzie, in which he altered the order of succession, by postponing the female issue of sons' bodies to daughters of the marriage. He was survived by one son of the marriage, who made up titles and possessed under the entail, and thereafter brought a reduction of it, on the ground that his father had no power to defeat the right of his daughters as substitutes under the marriage contract. Now, the father was fiar under the destination in the marriage contract, and, but for the obligations imposed upon him by that deed, could have defeated the rights of all or any of the substitutes, including his children. If the destination to female issue of the son had not been obligatory, the entail would have been unimpeachable, because it gave to the son, whose substitution was admittedly onerous, all that he was entitled to by the marriage contract, namely, a tailzied fee of the estate during his lifetime. The Lord Ordinary and the Inner House judges concurred in setting aside the entail. The Lord President Hope said (1): "There is here merely a reservation to entail so as to preserve the estate in favour of the heirs of the marriage, but not to introduce new heirs." And Lord Gillies observed: "I suppose we shall be called on by-and-by to decide whether the eldest son is the heir of his father. I look on this question as equally clear."

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(1) 1 Paton App. 364.

(2) Mor. Dict. 13,010; Elchies, vide Mutual Contract, No. 20.

(3) 6 Court Sess. Cas. 1st Series (Shaw), 1043.

I shall only cite one other case, *Arthur and Seymour* v. *Lamb* (2), which was decided by the First Division in 1870, on a remit from the Court of Chancery. Having regard to the ground upon which the respondent's counsel endeavoured to impeach the authority of the decision, it becomes necessary to state, not only the facts of the case, but the terms of the remit, and the circumstances in which it was made.

(1) 6 Court Sess. Cas. 1st Series (Shaw), at p. 1047.

(2) 8 Court Sess. Cas. 3rd Series (Macpherson), 928; 42 Sco. Jur. 542.

Before his first marriage in 1815, Sir Charles Lamb bound himself, by a contract with his intended spouse, to settle and secure one-half of his estate then belonging to him, or which he might conquest and acquire or succeed to in fee simple during the subsistence of the marriage, to and in favour of himself in life-rent, and "to the children of the said intended marriage in fee." The marriage was dissolved by the wife's decease in 1848. One son was born of it, who died in 1856, leaving a widow and four children, and also a settlement by which he conveyed his whole estate to certain persons therein named as his trustees and executors. His estate was made the subject of an administration suit, in which the Vice-Chancellor gave the trustees leave to file a bill against Sir Charles Lamb for specific performance of the obligations undertaken by him to the children of the marriage by the contract of 1815. A bill was accordingly filed, on the footing that the provision had vested in the only child of the marriage and had passed to the plaintiffs as his trustees and executors. Sir Charles died in 1860, and his widow by a second marriage, whom he had appointed his executrix, universal devisee and legatee, was made defendant in his stead. A case was then prepared and sent down for the opinion of the Court of Session, with the view of ascertaining whether the marriage contract obligation in favour of children was still binding upon the widow as representing her deceased husband, and, if so, whether it had vested in the son of the first marriage. After hearing parties, the learned judges of the First Division declined to answer the queries put to them, because the case did not state whether or not the son had left issue of his body who were surviving at the death of Sir Charles in 1860. They accordingly sent back the case to the Court of Chancery for amendment in these particulars.

An amended case was thereafter sent down, in which particulars as to the then surviving issue of the son, and the pleas maintained by the parties respectively were fully stated. As therein set forth, the plaintiffs (inter alia) maintained (1.) that the rights provided to children by the marriage contract of 1815 vested in the son and were carried to them by his settlement, and (2.) that if these rights did not vest in their author, they vested in his issue upon the death of their grandfather. The defendant, on the other hand, maintained that the provisions created no jus crediti in the child during his father's lifetime, and that, being conceived in favour of children only, they lapsed by the child's predecease. The Court of Session was asked to decide whether, and how far, these respective contentions were well founded; and also, in the event of all or any of them being erroneous, what was the true legal interpretation, and what would be the legal effect and operation of the marriage contract of 1815. It appears from the report of the case (1), that all these points were fully argued. The First Division unanimously found that Sir Charles Lamb continued to be fiar during his lifetime of the estate settled upon the children of the marriage by the contract of 1815, so that their right of succession did not open until his death; that no jus crediti vested in the son of the marriage which he could dispose of by will; and that the provision did not lapse by his predecease, but subsisted in favour of his issue whose right could not be defeated by a gratuitous deed. The last of these findings, in so far as it relates to the legal substitution of issue of the predeceasing child, was accepted as authoritative by this House in the recent case of *Hughes* v. *Edwardes* (2).

It was argued for the respondents that the decision is of no authority, because the grandchildren whose right it affirms were not parties to the litigation. I am unable to take that view, because the point decided was directly and competently raised by the remit, and was fully argued by the trustees on the one hand, and on the other by the widow, who was the only person interested in maintaining that the provision had lapsed. In these circumstances, I think the decision ought to be regarded as a deliberate and weighty expression of judicial opinion.

So far as I have been able to discover, the only differences between the facts of this case and the facts upon which judgment proceeded in *Stewart* v. *Graham* (3) and *Arthur and Seymour* v. *Lamb* (4) are the following: In both these cases the father did

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(1) 8 Court Sess. Cas. 3rd Series, at pp. 930, 931.

(2) [1892] A. C. 583.

(3) 1 Paton App. 364.

(4) 8 Court. Sess. Cas. 3rd Series (Macpherson), 928; 42 Sco. Jur. 542.

Lord Watson.

not convey, but came under an obligation to convey; whereas in the present case, instead of obliging himself to do so, he made a conveyance. Again, in *Arthur and Seymour* v. *Lamb* (1) the provision was to "children of the marriage," and not, as in *Stewart* v. *Graham* (2), to the heirs to be procreate of the marriage, or, as in this case, to children and the issue of their bodies. Notwithstanding these differentiæ, I think there is no room for drawing a distinction in principle between the three cases. To my mind, it is simply inconceivable that, as the respondents maintained, an ante-nuptial conveyance by a parent to children or heirs of the marriage should be gratuitous and not binding upon him, and that his ante-nuptial undertaking to convey the same estate, and in the same terms, should be onerous and obligatory. The other difference, which occurs in *Arthur and Seymour* v. *Lamb* (1), is, in my opinion, most unfavourable to the respondents, because it establishes that, where the destination is only to children of the marriage, the issue of a predeceasing child take, by virtue of the condition si sine liberis, a right to his provision, which is protected against the gratuitous deeds of their grandfather. It is not easy to understand why substitutes introduced by legal presumption, in deference to the presumed will of the spouses, should take a higher right than they would have done if they had been called expressly.

There is really no conflict of authority upon the present question; the cases are all one way; not a single decision was cited at the Bar in which it was held, or even suggested, that an ante-nuptial provision by one or other of the spouses, to descendants of their marriage, is not onerous as regards every such descendant in a question with the settlor. If any such case exists, which I venture to doubt, I have been as unsuccessful as the respondents' counsel in my endeavours to find it.

I think it right to notice that the respondents strongly relied upon the case of *Routledge* v. *Carruthers* (3), as leading necessarily to the inference that provisions to heirs of the marriage more remote than children are gratuitous. That case establishes, that when a father, by his marriage contract, settles an estate upon himself, with a substitution to children of the marriage, (1.) he can satisfy the provision by propelling the estate during his lifetime to the heir apparent of the marriage, in prejudice of heirs who might have taken at his death, and (2.) inasmuch as the expectant heir could reconvey the estate to the settlor, immediately after its acceleration, he can by a transaction with the settlor discharge the provision, and thereby extinguish the rights of the other substitutes as well as his own. The rule is an anomaly; and in my opinion, any inferences drawn from it, for the purposes of this case, might be very apt to mislead. I greatly doubt whether it has any application to cases in which the provision is of a spes successionis merely. I think Lord Eldon would in all likelihood have reversed the judgment appealed from, had it not been that a majority of the consulted judges found, upon a question specially remitted for their consideration, that at the date of the transaction impeached Mrs. Routledge, the expectant heir, was "vested in the jus crediti under the marriage contract, 1735, so as to give her power to discharge the obligation thereby incumbent on her father."

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(1) 8 Court Sess. Cas. 3rd Series (Macpherson), 928; 42 Sco. Jur. 542.

(2) 1 Paton App. 364.

(3) 4 Dow. 392; 2 Bli. 692; 6 Pat. 597.

But assuming the rule of *Routledge* v. *Carruthers* (1) to rest upon intelligible principle, and to apply in cases where the heirs of the marriage take a spes successionis, and not a jus crediti, how does it tend to support the conclusion that heirs who are children take an onerous, and heirs who are grandchildren a gratuitous, right? The rule operates in the same way, and with precisely the same results, against the substitutes of either class. Propulsion by the parent settlor to the apparent heir, or a discharge of the marriage provision by the latter, extinguishes the right of substitutes who are children, and whose right is admittedly onerous, as effectually as the rights of grandchildren and remote descendants whose right is said to be gratuitous.

Entertaining these views, I have no difficulty in coming to the conclusion that the appellant must prevail in competition with the respondents for the fee of his grandfather's estates.

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(1) 4 Dow. 392; 2 Bli. 692; 6 Pat. 597.

LORD MACNAGHTEN :—

My Lords, I have had an opportunity of reading the opinion which has been expressed by my noble and learned friend Lord Watson, and I entirely agree.

LORD MORRIS, concurred.

LORD SHAND :—

My Lords, my noble and learned friend Lord Watson was good enough to communicate to me the opinion which he has now delivered, and which contains a very careful statement of the grounds on which he rests the conclusion that the decision in the Court below should be reversed, and that the appellant should be found entitled to the estate left by his grandfather. Having given my best consideration to the case and the argument, I concur in his Lordship's views, and I shall content myself with merely adding a few general observations, for I could not hope to put the special grounds on which the judgment of the House must rest in more apt and clear language; and mere repetition would serve no good purpose.

By his ante-nuptial contract of marriage Mr. Hall, the pursuer's grandfather, conveyed to the child or children of the intended marriage, and the issue of the bodies of such children, not only the estate of which he was then possessed, which was not of large amount, but the whole estate, real and personal, of which he might die possessed. Jane Chisholm Scott, afterwards Mrs. Hall, at the same time conveyed in favour of her intended husband and his heirs such estate as she then possessed or might acquire during the subsistence of the marriage, and the marriage followed on the faith of the deed. The parties are agreed that neither children of the marriage nor grandchildren could maintain that the deed conferred on them a jus crediti in Mr. Hall's estate so long as he lived, for the reason that down to the time of his death he was entitled to deal with that estate as his own, and without control of any kind. And the single question to be determined is, it being conceded that any child or children of the marriage surviving Mr. Hall had a spes successionis protected

—a protected right of succession—which their father could not defeat by mortis causa deed (except to a certain extent it might be in the event of his marrying a second time), whether failing a child by his predeceasing his father, his child, a grandchild, has or has not the same protected spes successionis.

The learned counsel for the respondents pressed strongly on the attention of your Lordships as an element which ought to receive great weight, the consideration of the hardship that must result in the present case, as in other cases of the same class, from the circumstance that if the claim of the pursuer should receive effect this affirms the view that Mr. Hall, however large his means might have grown to be at his death, could not make a bequest even of small amount to any person or for any purpose he might desire. To some extent this observation is met by the circumstance that what may not be done by testament can be done during life by one who has complete control over his estate. But I confess it has been surprising to me that settlements on the occasion of marriage should so often contain a clause, even in favour of children, disposing of acquirenda and embracing the whole of the estate of which a parent shall die possessed, however large, without even a reserved power to deal mortis causa with part of it. I suspect this has arisen in a great measure from the adoption of words which are given in books of style, and without due consideration of the important consequences. But, however this may be, if the terms used be clear and unambiguous, as they are in this case, they must receive effect. It is unquestionable they must do so in the case of children. The sole point for determination is whether grandchildren, failing their parents, have not by virtue of the contract the same rights; and the decision of that question must be the same whether the obligation of the contracting spouses, or the terms of the words of destination in the conveyance, relate to acquisita only or to acquirenda also. In both cases alike it must depend on the legal effect of the terms used.

The destination in this case is to children, "and the issue of the bodies of such children." These words obviously create a conditional institution, not a substitution, and the provision is to be read as if it were expressed as, failing children, then to grandchildren, or it may even be descendants of children of a remoter degree than grandchildren. Was it then a part of the contract—a consideration on the faith of which the marriage took place, that grandchildren, failing their parents, should have by the terms of the destination in the deed a protected right of succession, or is the provision in favour of grandchildren voluntary and testamentary merely on the part of Mr. Hall, and liable to revocation by him at any time by a mortis causa deed?

If the question were now to be presented for the first time and without authority on either side, I confess I should have no difficulty in holding (what I understand to be the view acted on in England) that, failing children, their descendants are within the consideration on which the marriage takes place. For myself I do not attach the weight which judges from time to time have done, in elaborate opinions in the class of cases to which I shall afterwards advert, to the fact that children have rights of legitim, or even rights of maintenance, such as indeed grandchildren also have when, failing their parents, necessity arises, a right and obligation which indeed it may be observed is reciprocal in its nature. I do not think that contracting spouses or their advisers have any such matters in view as a moving consideration for settling either an intended husband's or wife's means on children or descendants, though a man of business will very properly in many cases in preparing an ante-nuptial settlement exclude future claims of legitim. Indeed, in the case of means settled by a wife, no such consideration arises, and it will not be suggested that the same terms of obligation or of destination would be interpreted differently in the case of a husband from that of a wife. The consideration of the marriage based on grounds of presumed natural affection cannot, I think, be confined to children only, but extends to issue of the marriage in the wide sense of the term, including certainly grandchildren, but even remoter descendants; and I think the strength of the presumption si sine liberis in the case of parents, or of persons about to marry, who have made provisions expressly in favour of children only with substitutions in favour of others, is to a great extent to be traced to the same source, viz., presumed natural affection, which applies so as to bring in grandchildren by implication to the exclusion of substitutes, even though these may be heirs in the collateral line of succession.

But I am also of opinion with reference to the authority of the institutional writers and the cases fully referred to in the judgment of my noble and learned friend, that the pursuer is entitled to succeed in his claim. The three cases of *Stewart* v. *Graham* (1), *Macleod* v. *Macleod* (2), and *Arthur and Seymour* v. *Lamb* (3), do not appear to have been under the consideration of the learned judges of the Court of Session, or, indeed, to have been cited in the argument. And the last of these cases, decided in 1870, containing an obligation in favour of children only of the intended marriage, seems to me to be directly in point, and to have been well decided. In that case, as here, Sir Charles Lamb's marriage contract provision related to all estate which he might acquire during the subsistence of the marriage. His son predeceased him; but his grandchildren were held to have a protected right of succession which he could not defeat, and this was so held, as I think, in conformity with the principle supported by the earlier authorities, even although there was not as in this case any direct mention of grandchildren, on the ground that under the condition si sine liberis it must be presumed that grandchildren were called to the succession failing their parent, the son of Sir Charles Lamb. The clause in that case was one of obligation and not of destination; but that could in my opinion make no difference. The obligation was to "settle and secure" the estate in favour of himself in life-rent and "to the children of the said intended marriage in fee," and that obligation would have been in terms fulfilled if Sir Charles Lamb had executed a conveyance embodying these words as the destination. The meaning and legal effect of the words, however, must be the same, whether taken from the obligatory clause of the marriage contract, or from the dispositive clause in the conveyance or settlement. This disposes of one distinction which the respondents' counsel endeavoured to draw between that case and the present. The other criticism of the case, already noticed by my noble and learned friend, that it was decided in favour of the grandchildren although they were not represented in the suit, would seem to me, if it were so, to make the decision all the stronger when given in their favour. But their interests were obviously represented by the trustees under the settlement in competition with his widow, who claimed to be universal legatee, and the Court were appealed to to say "what was the true legal interpretation, and what would be the legal effect and operation of the marriage contract?"

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(1) Mor. Dict. 13,010; Elchies, vide Mutual Contract, No. 20.

(2) 6 Court Sess. Cas. 1st Series (Shaw), 1043.

(3) 8 Court Sess. Cas. 3rd Series (Macpherson), 928; 42 Soc. Jur. 542.

Their Lordships in the Court of Session have referred to certain cases which, in the view of the legal effect of the deed which they adopted, seemed to them to have an important bearing on the matter in controversy. Of the case of *Mackie* v. *Herbertson, or Gloag's Trustees* (1), I have only to say that it seems to have been decided on the view already explained that the parent had by the trust created, and by having parted with the property in question, entirely divested himself of the estate in favour of the beneficiaries under the trust; so that no deed, such as Mr. Hall's settlement in this case, could any longer affect the property. The cases of *Pretty* v. *Newbigging* (2), *Routledge* v. *Carruthers* (3), and other cases of that class, undoubtedly involved an examination of the nature of the rights of children and of grandchildren in many instances under obligations or destinations somewhat similar to that which occurs in this case, and there are in these cases numerous dicta by different judges of a very conflicting nature, which no doubt have a bearing on the question here in controversy. But any bearing they may have is only indirect when it is kept in mind what was the question to be determined in these cases. In all of them that question was really whether the term of payment or of fulfilment of the obligation or destination by the parent could be accelerated or anticipated by the renunciation of a life-rent, or by propelling the fee so as to enable the child or first heir having right to the benefit of the obligation or destination to receive that benefit, or to transact with the parent in regard to it, and grant a discharge—with the result that a grandchild or other heir called, failing children, would have his spes successionis superseded or defeated. It has been repeatedly held that this could be done. But the ground of decision in these cases was not that the parent could at his own hand defeat the right of the grandchild or other conditional institute by executing a mortis causa deed by himself alone in favour of other beneficiaries, strangers; but only that he could give fulfilment of the obligation or destination to the heir first called by conveying or renouncing his own right, and so might also transact with that heir to acquire his right on the footing that this had been done.

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(1) 9 App. Cas. 303.

(2) 16 Court Sess. Cas. 2nd Series (Dunlop), 667; 26 Sco. Jur. 338.

(3) 4 Dow. 392; 2 Bli. 692; 6 Pat. 597.

In this view the principle regulating these cases appears to be that the heir, called by Lord Rutherfurd in the case of *Pretty* v. *Newbigging* (1) the "primary creditor," has received, or in cases of transaction is held to have received, the benefit, and the "subordinate right" of the conditional institute is extinguished. If, however, no such transaction has taken place with the heir first called, and that heir should predecease his parent, these cases are no authority for the proposition that the parent can thereupon by his own mortis causa deed in favour of a stranger defeat the right of a grandchild called to the succession on the failure of children. Then it might be suggested (I do not say it would be possible in the absence of any vested right in his daughter) that if Mr. Hall in this case had procured a discharge by his daughter, the only child of the marriage, of the provision of the deed in favour of children, and so had satisfied her spes successionis, the authorities referred to would have applied, and the grandchild's right would have been defeated. This would only have been in the view, however, that the term of fulfilment of the destination had been by transaction accelerated, and fulfilment had taken place. The case is quite otherwise where, as here, there has been no such transaction to affect the spes successionis of the grandchild, which is protected against the mortis causa act or deed of the father alone. I feel, as my noble and learned friend does, that the decisions to which I have referred present an anomaly, and it may be the principle on which they proceed is not altogether satisfactory—as, indeed, there is reason to suppose

(1) 16 Court Sess. Cas. 2nd Series (Dunlop), 667; 26 Sco. Jur. 338.

Lord Eldon thought. That principle is, however, clearly fixed and settled in the law, and must receive effect in cases to which it is applicable. But it appears to me that it does not apply in a case like this, where there was no transaction between Mr. Hall and his daughter, and nothing has occurred which could entitle Mr. Hall alone to defeat his grandchild's protected spes successionis or right of succession against his mortis causa deeds.

My Lords, I must add that it is satisfactory to me that your Lordships have not been called on to decide how far the widow could have claimed her life-rent right, or how far the annuity in her favour should be reduced to a very much smaller amount. The provisions which are contained in the marriage contract are of a complicated kind in consequence of the various events, which the agent drawing up the deed seems to have contemplated, and it may be that if the argument had proceeded, the widow's right might have been very materially reduced; but the counsel for the now successful party have agreed, and I think very properly agreed, that the provisions in favour of the widow should stand as a matter of arrangement between them.

My Lords, upon these grounds, concurring as I do with what has fallen from the Lord Chancellor and my noble and learned friend, Lord Watson, I am of opinion that the decision in this case ought to be reversed.

The Lord Advocate:—It has occurred to counsel on both sides that we were not quite certain whether, in making the concession of the life-rent in favour of the widow, we had made it clear to the House that it was intended to be subject to the obligation on the part of the widow to support the grandchild under the clause in the deed. We are quite agreed that it should be so.

LORD WATSON:—That will not be lost sight of in drawing up the Order of the House.

The Solicitor-General for Scotland:—I entirely assent to what my learned friend has said; and I beg to suggest, with the con-

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currence of my learned friend, that this is a case in which the costs of the parties might be taken out of the estate.

Ordered,—That the said Interlocutor of the Lords of Session in Scotland, of the First Division, of the 8th of March, 1892, *except so far as aforesaid (agreement as to costs), be, and the same is hereby Reversed, and it is Declared that the appellant Andrew Hall Macdonald is entitled to the whole fund in medio; and it is further declared, on the motion and with the consent of both parties, that the respondent, Mrs. Jane Chisholm Scott or Hall, is entitled to the life-rent of the said fund for her life-rent use allenarly, as provided to her by her marriage contract of the 7th of May,* 1849, *but that upon the condition that she shall maintain the appellant, Andrew Hall Macdonald, as provided by the said contract in the case of children of the marriage: And it is further Ordered, That the expenses hitherto incurred by the appellants and by the respondents respectively in the Court of Session, and also the costs incurred by them in respect of the Appeal to this House, as between agent and client, be paid out of the fund in medio, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments: Cause remitted to the Court of Session in Scotland, with power to decern for payment to the parties of the said expenses and costs respectively.*

Lords' Journals, 24th July, 1893.

Agents for appellants: *Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S., Edinburgh.*

Agent for respondents: *Andrew Beveridge, for Thomas White, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) **COWIE** . . . . APPELLANT;

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AND

June 20. **MUIRDEN** . . . . RESPONDENT.

Heritage—Real or Personal Burden—Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 *Vict.* 101), *s.* 19, *sub-s.* 4.

A testator, by mortis causa settlement, conveyed and assigned to his son in general terms his whole estate, heritable and moveable, declaring in the dispositive clause that the disposition was granted and was to be accepted under the following burdens, which are "hereby declared to be real burdens on the estates and effects hereby conveyed." One of these was a free annuity of £35, payable to the testator's daughter during her life. After the testator's death the son completed titles to the various heritable subjects in which the testator had been infeft by expeding and recording notarial instruments in terms of the 19th section and relative Schedule L of the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101). In all of these instruments the daughter's annuity was inserted at full length, and declared to be a real burden upon the land.

The son's estates were sequestrated, and his trustee in bankruptcy claimed that the daughter's annuity had not been validly constituted a real burden upon the lands:—

Held, reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 706) that the annuity had been constituted a real burden upon the lands in question.

Williamson v. *Begg* (14 Court Sess. Cas. 4th Series (Rettie), 720) distinguished.

APPEAL from a judgment of the Second Division of the Court of Session (1), Scotland, affirming the interlocutor of the Lord Ordinary in an action of declarator at the instance of Alexander Muirden, the respondent and trustee on the sequestrated estates of Alexander Cowie, against Jane Cowie, the appellant.

Thomas Cowie died on the 29th of April, 1881, leaving a trust disposition and settlement by which he conveyed to his son, Alexander Cowie, his whole estates, heritable and moveable. The dispositive clause of this deed contained the following: "But

(1) 18 Court Sess. Cas, 4th Series (Rettie), 706.

declaring that this disposition and settlement is granted, and is to be accepted under the following burdens, conditions, obligations, and declarations, which are hereby declared to be real burdens on the estates and effects hereby conveyed." "Further, in the event of the said Jane Cowie, my daughter, surviving me," and her mother, "the said Alexander Cowie, and his foresaids, shall be bound and obliged to pay to my said daughter a free annuity of £35 sterling per annum, and that during the whole period of her life after the death of both her said mother and me."

This annuity was paid by Alexander Cowie till 1886, when his estates were sequestrated. The heritable estates belonging to Thomas Cowie consisted of five subjects, to which Alexander Cowie completed a title in 1882, by expeding and recording notarial instruments conform to schedule L of the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 19. Each of these instruments set forth Thomas Cowie's titles and infeftments, and narrated the annuity in the same terms the testator had used. The trustee on Alexander Cowie's estates claimed that the annuity had not been constituted a real burden on the heritable subjects to which the debtor had made up titles.

The Lord Ordinary (Wellwood), on the 15th of November, 1890, held that the annuity was not validly constituted a real burden. This decision the Second Division—the Lord Justice Clerk doubting, and Lord Rutherfurd Clark dissenting—affirmed on the 17th of March, 1891. (1)

On appeal,

June 26, 27. *T. Shaw*, and *M. R. Greenlees* (both of the Scotch Bar), for the Appellant:—

The Court of Session have followed a dictum of Lord President Inglis in *Williamson* v. *Begg* (2). But that case was perfectly distinct. There the language alleged to create the real burden was not found in the dispositive clause, but in a subsequent part of the deed. Lord Rutherfurd Clark strongly

(1) 18 Court Sess. Cas. 4th Series (Rettie), 706.

(2) 14 Court Sess. Cas. 4th Series (Rettie), 720.

dissented from the dictum of Lord Inglis. Here the grantee has implemented the obligation of real burden to the best of his ability, and the estates are validly bound under the annuity. The simple method of taking infeftment by notarial instrument is regulated by the Titles to Land Consolidation Act (31 & 32 Vict. c. 101), s. 19 (1), by which it is competent to complete a title by notarial instrument in the form of Schedule L (2),

(1) The 19th section to the Titles to Land Consolidation (Scotland) Act provides: "Where a person shall have granted or shall grant a general disposition of his lands, whether by conveyance mortis causa or inter vivos, or by a testamentary deed or writing within the sense and meaning of the 20th and 21st sections of this Act, and whether such general disposition shall extend to the whole lands belonging to the grantor or be limited to particular lands belonging to him with or without full description of such lands, and whether such general disposition shall contain or shall not contain a procuratory or clause of resignation, or a precept of sasine or an obligation to infeft, or a clause expressing the manner of holding, it shall be competent to the grantee under such general disposition to expede and record in the appropriate register of sasines a notarial instrument in or as nearly as may be in the form of Schedule L hereto annexed; and on such notarial instrument or any similar notarial instrument expede in virtue of any Act of Parliament hereby repealed being so recorded such grantee shall be in all respects in the same position as if a conveyance of the lands contained in such notarial instrument had been executed in his favour by the grantor of the general disposition, to be holden, in the case of lands not held by burgage tenure, by such manner of holding, if any, as is expressed in the general disposition, and if no particular manner of holding is therein expressed, then to be holden in the manner and to the effect, and subject to the provisions enacted and provided in the 6th section of this Act in the case of conveyances in which no manner of holding is expressed, and in the case of lands held burgage tenure to be holden of Her Majesty in free burgage, and as if such conveyance had been followed, where such lands are not held by burgage tenure by an instrument of sasine of the said lands in favour of such grantee, or, where they are held by burgage tenure, by an instrument of resignation and sasine thereof in his favour expede and recorded in the appropriate register of sasines at the date of recording such notarial instrument, provided always, that where such notarial instrument shall be expede by a person other than the original grantee under such general disposition, it shall set forth the title or series of titles by which the person in whose favour it is expede acquired right to such general disposition, and the nature of his right."

(2) Schedule "L" was as follows: "At —— there was by A. B. of Z. presented to me notary public subscribing a disposition [specify the disposition or other deed or instrument or extract thereof, as the case may be] recorded in the [specify register of sasines and date of recording], by which recorded disposition [or otherwise as

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proceeding upon the general disposition itself—the instrument particularly describing the lands as set out in the disposition to the grantor and his infeftment, which must be produced to the notary. " And such notarial instrument being so recorded, such grantee shall be in all respects in the same position as if a conveyance of the lands contained in such notarial instrument had been executed in his favour by the grantor of the general disposition." Then the schedule is as follows: " If the deed be granted under any real burden, condition, or qualification, add here but always under the real burdens, &c." The words, " the deed," refer to the general disposition purporting to be granted under the real burdens, and these burdens are to be inserted in the instrument. The recording of the notarial instrument feudalises and specialises the general conveyance. That is, the general disposition and the notarial instrument are to be read as one deed. Therefore, though there might be said to be a defect in the general disposition, the particular lands charged not being described, each of the notarial instruments specifies the lands in the general disposition, and operated as a conveyance of those lands, burdened as the testator desired. Without the Act, the

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the case may be] C. D. of Y. was infeft in all and whole [describe the lands or other subjects, as the case may be, as the same are described in the said disposition or other deed or instrument]; as also there was presented to me a general disposition [or other deed or conveyance or testamentary deed or writing, as the case may be, or an extract of such deed] granted by the said C. D. and dated [insert date] by which general disposition [or otherwise as the case may be] the said C. D. disponed [or gave or granted or bequeathed (or otherwise as the case may be) to the said A. B. and his heirs and assignees (or otherwise as the case may be), heritably and irredeemably (or in life-rent, or otherwise as the case may be) all and sundry the whole heritable estates (or otherwise as the case may be) of which he was (or might die) possessed (or otherwise as the case may be) [if the deed be granted under any Real Burden or condition or qualification, add here, but always under the Real Burdens, &c.; and if the deed be granted in trust, or for specific purposes, add but always in trust or for the uses and purposes mentioned in said general disposition, or otherwise as the case may be. If the person expeding the instrument be other than the general disponee or grantor or legatee under the deed, add, as also there was presented to me (specify the title or series of titles by which such person acquired right, and the nature of his right)]. Whereupon this instrument is taken in the hands of, &c."

person in right of the annuity could have proceeded to make the burden real by an action of adjudication, followed by a charter of adjudication specifically describing the lands, and those lands would be bound.

John Wilson (of the Scotch Bar), and *C. M. Le Breton*, for the respondent:—

It is necessary, to enable a burden to run with the land, that it should be definite and certain; and the lands to be burdened must be specified. If these conditions are not satisfied, neither the declaration of the testator, nor the fact that the burden is described as real in the notarial instrument, will constitute the right. Sect. 19 and Schedule L of the Act provide a shorter method of completing titles than that previously in use; but if the disponer has not used the words necessary, his intention will not suffice (see Lord Moncreiff in *Baird's Trustees* v. *Mitchell* (1)). The Act did not alter the law of Scotland in regard to the mode of creating a real burden. If the burden has not been imposed in the general disposition on specific lands, it cannot be made real by its incorporation into the notarial instruments, they being only the formal act of a notary, whose warrant is strictly limited by the terms of the general disposition.

The person whom the trustee here represents could have completed his title in another way and passed by the burden, leaving the appellant but a personal right.

[Lord Watson:—I do not admit that to be the law.]

Judgment after consideration.

Lord Herschell, L.C.:—

My Lords, this action was raised by the respondent, who was trustee under the sequestration of the estates of Alexander Cowie, in order to have it declared that an annuity of £35 had not been validly or effectively constituted a real burden upon the heritable subjects described in the summons. In the year 1881 Thomas Cowie died, leaving a trust disposition and settlement

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(1) 8 Court Sess. Cas. 2nd Series (Dunlop), 464, 471.

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by which he conveyed to his son Alexander Cowie, the bankrupt, his whole estate heritable and moveable, real and personal, of which he should die possessed. The dispositive clause, after thus conveying the whole estate, proceeds in these terms: "But declaring that this disposition and conveyance is granted, and is to be accepted of, under the following burdens, conditions, obligations and declarations, which are hereby declared to be real burdens on the estate and effects hereby conveyed." Then follows a statement of certain burdens, including amongst them the annuity of £35 per annum now in question. The heritable estate belonging to Thomas Cowie consisted of five subjects, and Alexander Cowie completed his title to them in the year 1882, in virtue of the general disposition to which I have alluded, by expeding and recording notarial instruments in accordance with the terms of Sched. L of the Titles to Land Consolidation (Scotland) Act, 1868. Each of these instruments sets forth Thomas Cowie's title and infeftment and the general disposition granted by him to which I have referred, and each of them narrated specifically and at length the real burdens purporting to be constituted, as I have said, by the general disposition and settlement. Each of these notarial instruments was duly recorded in the Register of Sasines, and the clause of annuity in favour of the appellant, declared to be a real burden on the disponee's right, was entered on the records.

My Lords, the ground upon which it was contended that under the circumstances to which I have referred the annuity was not effectually constituted a real burden upon the heritable subjects was that the title of Alexander Cowie was derived from a general disposition which did not contain a description of the lands to be affected. It is no doubt true that a real burden can only be constituted upon lands specifically described; but it is equally clear that even if lands specifically described in a disposition be thereby declared subject to a burden, that does not in itself make the burden a real one; it can only be made real by infeftment. Before the Titles to Land Act was passed a disponee who was not an heir could only get infeftment in land conveyed to him in general terms by obtaining a decree in an action of adjudication followed by a charter of adjudication. By this process a real right was obtained to the lands specifically described in the charter; but this real right was subject to all debts which having been made a burden on the general conveyance by apt words in the dispositive deed were thus feudalized and became real burdens.

The question to be determined in the present case is whether, where a title is completed, not in the manner which was alone available prior to the Titles to Land Act, but in the manner which is provided for by the enactments contained in that Act, the title obtained by the appropriate instruments in the form prescribed by Sched. L can be and ought to be effectual to make burdens which by appropriate words are declared to be burdens in the dispositive clause of a general conveyance, real burdens. This depends upon the construction of the 19th section of the Titles to Land Consolidation Act, 1868. That section provides that "where a person shall have granted or shall grant a general disposition of his lands, whether by conveyance mortis causa or inter vivos, or by a testamentary deed or writing," "and whether such general disposition shall extend to the whole lands belonging to the grantor, or be limited to particular lands belonging to him, with or without full description of such lands," "it shall be competent to the grantee under such general disposition to expede and record in the appropriate Register of Sasines a notarial instrument in or as nearly as may be in the form of Sched. L hereto annexed; and on such notarial instrument or any similar notarial instrument expede in virtue of any Act of Parliament hereby repealed, being so recorded, such grantee shall be in all respects in the same position as if a conveyance of the lands contained in such notarial instrument had been executed in his favour by the grantor of the general disposition." The schedule referred to in that clause, which gives the form of the notarial instrument, prescribes that it shall be stated that there was presented a disposition (specifying the disposition or instrument) which had been recorded in the Register of Sasines, by which a certain person was infeft in the lands, and then describing the lands or other subjects as they are described in the disposition or instrument; and the schedule contains this clause: "If the deed be granted under any real burden or condition or qualification, add here, 'but always under the real burdens,' &c."

Now, my Lords, it appears to me that the design of this statute was to provide a simpler method of completing titles than that which had been theretofore in use, and that where the dispositive clause in the general conveyance purports to subject the land conveyed to certain real burdens, it is only right that the notarial instrument should follow the terms of the dispositive clause including the declaration of these real burdens. I can see nothing in the statute or in the schedule to point to another conclusion; and, inasmuch as the former method of making up titles is in no way put an end to, it would certainly be strange if a disponee by making choice of a particular method of making up his title should be able to obtain a real right in the land free from any burden, whereas by making it up in another way he could only obtain a real right subject to the burden. I cannot think that there was any such intention on the part of the legislature when this statute was passed; and, I confess, I cannot myself feel any difficulty in giving to it the construction contended for by the appellant.

My Lords, the difficulty chiefly felt in the Court below, which led, I think, to their decision, arose from the authority, or the supposed authority, of the case of *Williamson* v. *Begg* (1) as determining the question which now comes before your Lordships for consideration. *Williamson* v. *Begg* (1) was treated as having decided that the statute to which I have referred, and the schedule in so far as it related to the statement of the real burdens, only applied where the disposition was specific as well as general. I do not think that any such point was decided in the case of *Williamson* v. *Begg* (1). That was an action, brought by a person to whom certain rights had been given under a disposition, to recover damages against a law agent who had been concerned in making up the title, on the ground that he had been guilty of a breach of duty in not having had it made up in such a form as to constitute the obligation a real burden, whereby the person who had the right to the obligation had been damnified. In *Williamson* v. *Begg* (1) the words which purported to declare that the obligation should be a real burden were not contained in the dispositive clause; and moreover it was of course incumbent upon the pursuer in that case to make out that if the defender had done his duty the result would have been to create this obligation a real burden. He failed, to my mind, to establish any such duty on the part of the law agent. The dispositive clause was set out in terms in the notarial instrument; but the language which, it was suggested, created the real burden, was not contained in that dispositive clause; it was found in a subsequent part of the disposition. Therefore, under those circumstances, the foundation upon which the claim of the pursuer was rested entirely failed. It is quite true that in the judgment of the learned Lord President observations are to be found which do appear to indicate an opinion on his part such as I have alluded to, that the provision in the schedule—the statement of the real burdens—is only applicable where the disposition is specific as well as general. I have already given my reasons for differing, with all respect, from the view of the Lord President, and I do not find in the opinions of any of the other learned judges language which indicates that they were resting their judgments upon such a ground.

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(1) 14 Court Sess. Cas. 4th Series (Rettie), 720.

My Lords, I have only to add that I have carefully perused the judgment of Lord Rutherfurd Clark in the Court below, and that I entirely concur in all that learned judge said with regard to the construction of the statute.

Lord Watson:—

My Lords, the late Thomas Cowie, by mortis causa settlement, disponed and assigned to his son Alexander the whole estate heritable and moveable belonging to him at his death, subject to certain provisions which he declared to be real burdens on the estate and effects thereby conveyed. One of these provisions was a free annuity of £35 payable to his daughter, the appellant, during her lifetime.

After the death of the testator, Alexander Cowie, as his general disponee, completed titles to various heritable subjects in which the deceased had been infeft, by expeding and recording notarial instruments in terms of sect. 19 of the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 19, and relative Sched. L. In all of these instruments the appellant's annuity was inserted at length, and declared to be a real burden upon the lands specifically described in the same language which the testator used in making it a burden upon his general conveyance.

It is material to notice that in the settlement the burden is aptly introduced as qualifying the words of disposition. If the testator had in the dispositive clause described any particular lands it would have attached to these lands. So also if the testator had executed special conveyances in terms of the notarial instruments expede by his son, it would have constituted a valid incumbrance upon the lands conveyed. Upon that point I entertain no doubt, and it was not disputed by the respondent's counsel.

Alexander Cowie's estates were sequestrated, and the respondent, who is trustee in the sequestration, brought this action, in order to have it found and declared that the annuity has not been validly constituted a real burden upon the bankrupt's land. The Lord Ordinary decerned in terms of the conclusions of the summons; and his interlocutor was affirmed in the Inner House by a majority of two judges against one.

All the learned judges were of opinion that this case is directly ruled by *Williamson* v. *Begg* (1), decided by the First Division in 1887, which they accepted as res judicata, to the effect that no real burden which a general conveyance purports to impose, however apt the language in which it is expressed, and however intimate its connection with the words of conveyance, can be specialized and feudalized by means of a notarial instrument under the Act of 1868. The Lord Justice Clerk (Macdonald) indicated that, but for that authority, he would have decided in favour of the Appellant. Lord Rutherfurd Clark was very strongly of opinion that the decision of the First Division was wrong. Lord Trayner was the only judge who approved of the decision in the sense in which it was accepted.

I am by no means satisfied that the question arising for decision in this appeal was really decided by the Court in *Williamson*

(1) 14 Court Sess. Cas. 4th Series (Rettie), 720.

v. *Begg* (1). The action in that case was at the instance of the annuitant, who claimed damages from the law agent by whom the titles of the disponee were made up, in respect of his failure to make the annuity a valid burden on the lands. In other respects, the circumstances of that case and the present are very similar, with this important difference, that in *Williamson* v. *Begg* (1) the annuity was not, in apt terms, made a real burden by the general conveyance, and would not have constituted a valid burden if the conveyance had been special. The disponee was, therefore, under no obligation to convert into a real, that which his author had only made a personal, burden.

From an examination of the report, I infer that the decision of the Court in *Williamson* v. *Begg* (1) went upon these two grounds: (1.) That the declaration relating to the pursuer's annuity merely gave rise to a personal obligation, and was ineffectual to create a real burden in any conveyance; and (2.) That the defender, in making up the titles of the disponee, was not employed by, and therefore owed no duty to, the pursuer. I do not doubt that either of these reasons was sound and in itself sufficient to sustain the judgment. With the first two paragraphs of the late Lord President's opinion, I agree. But I think Lord Rutherfurd Clark is warranted by the terms of the third paragraph in ascribing to that eminent judge the doctrine that the direction in Sched. L. with respect to the insertion of real burdens, only applies in those cases where the conveyance is special as well as general, and the burden has already been duly imposed upon lands specially described. Lord Mure's judgment does not necessarily imply his concurrence upon that point; and my noble and learned friend opposite (Lord Shand) takes no notice of it in his opinion, which proceeds on the view that the declaration merely created a personal obligation on the disponee, which he was not bound to convert into a real burden, there being no condition or declaration that he should do so. Lord Adam's concurrence in the result at which his brethren had arrived does not, in my opinion, express his assent to all the views of the Lord President.

Apart from the authority, real or supposed, of *Williamson* v.

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(1) 14 Court Sess. Cas. 4th Series (Rettie), 720.

Begg (1), the point does not appear to me to be attended with any difficulty. Until the passing of the Titles to Land (Scotland) Act, 1858 (21 & 22 Vict. c. 76, s. 12), which was repealed by the consolidating statute of 1868, a disponee who was not the heir could not get infeftment in land generally conveyed to him except by obtaining decree in an action of adjudication directed against the disponer's heir, followed by a charter of adjudication. The effect of his pursuing that course was, not only to give him a real right in the lands as specifically described in the decree and charter, but to feudalize, as a real burden upon those lands, every debt which had been duly made a burden upon the general conveyance. The object of the legislation of 1858 and 1868 was to provide an alternative and less cumbrous method of vesting feudally in the disponee the estate and interest conferred upon him by the general conveyance. It can hardly have been the intention of the legislature to give the disponee who avails himself of that method an absolute and unqualified estate, in cases where his author has by his words of disposition only given him a limited or qualified right. Yet that is the practical result of what the majority of the learned judges have held to be the law applicable to this case.

Sect. 19 expressly provides that a notarial instrument, in the terms prescribed by Sched. L, shall, when recorded, place the disponee in the same position as if a conveyance of the lands therein specified had been executed in his favour by the grantor of the general disposition, and had been followed by an instrument of sasine duly recorded. Tried by that test, the notarial instruments expede by Alexander Cowie effectually constitute the appellant's annuity a real burden upon the lands therein particularly described. The question is, therefore, narrowed to the single issue, whether the words constituting the burden were warrantably introduced into these instruments. To that issue I can only see one answer. The words of disposition in the general conveyance must be repeated in the notarial instrument; and, if these words are qualified in the general conveyance, the qualification must appear in the notarial instrument. Any other construction of the statute would defeat the purpose which it was meant to serve. In the schedule, the words of disposition are immediately followed by this direction: "If the deed be granted under any real burden, or condition, or qualification, add here, 'but always under the real burden,' &c." The deed referred to is the general disposition; and the direction places beyond doubt what, to my mind, would have been sufficiently clear without it, viz., that the notarial instrument was meant to repeat the very words of disposition used in the general conveyance, with all the burdens and conditions by which they are qualified.

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(1) 14 Court Sess. Cas. 4th Series (Rettie), 720.

I shall only add that I concur in every word of Lord Rutherfurd Clark's reasoning upon the construction and effect of the statute. I accordingly concur in the judgment which has been moved by the Lord Chancellor.

Lord Morris:—

My Lords, I concur.

Lord Shand:—

My Lords, it seems to me to be of considerable importance in this case that the precise question to be determined should be ascertained and defined.

Alexander Cowie, the bankrupt, in whose right the respondent, as trustee on his sequestrated estate, maintains the present action, was the disponee under the general disposition and settlement of his father, the late Thomas Cowie. That deed did not convey the testator's lands by any special description of them, but did convey the "whole heritable estate" belonging to the testator; and as part of the dispositive clause it was declared that the conveyance was granted under the real burden of the annuity given to the appellant. The disponee, in completing his title by notarial instrument, recognised the validity of the real burden in so far as he could do so; for, after setting forth the various titles under which his father held different lands and giving the special descriptions of these, he embodied in the instrument the full terms of the dispositive clause of the general settlement, including that part of it which declared the annuity to be a real burden on the lands. In this way the real burden, by the act of the general disponee, entered the Register of Sasines, by which at least full notice of it was given to any one proposing to have any dealings relating to the lands. In this state of the title the only question to be determined is whether the terms of the general conveyance as the first step in the constitution of the real burden, warranted the second step of feudalizing it, by infeftment or registration under the notarial instrument. The decision is, as expressed by Lord Welwood that the real burden was not effectually constituted because there was no proper warrant for the act of the notary in expeding and recording the notarial instrument.

Their Lordships in the Court of Session have, I think, all held that this question was, in effect at least, decided by the case of *Williamson* v. *Begg* (1), in the decision of which I took part. I think this is not so, and I further think that this conclusion has been formed by the omission to observe one important fact, which appears from the report (1). In that case there was a clear defect in the first step towards the constitution of a real burden, for the declaration founded on was no part of the dispositive clause. This is expressly stated by the reporter, and, having had an opportunity of seeing a copy of the deed, I find that at the end of the dispositive clause, and before any mention of real burdens, these words were interposed: "And I hereby nominate and appoint the said Thomas Beveridge to be my sole executor." It is true the learned Lord President, in the earlier part of the first paragraph of his opinion, referred to the absence of any special description of the lands, in the view, as I think, of more fully discussing what would be the effect of a notarial instrument under the statute, which he does in the third paragraph; but his Lordship added: "But there is a further reason why this declaration cannot receive effect. It cannot be followed by infeftment. The only way of effectually constituting a real burden is to insert a provision to this effect in the dispositive clause so that it shall enter the sasine." And his Lordship goes on to say with reference to this point: "But I do not think that, in the end, it was seriously contended that the declaration had the effect of creating a real burden," meaning obviously that it was not contended that the deed was so expressed as effectually to form the first step in the constitution of a real burden, to be completed by a recorded notarial instrument.

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(1) 14 Court Sess. Cas. 4th Series (Rettie), 720.

Professor Bell, in his Principles, sect. 920, states: "The burden must be declared in the dispositive clause," and there is abundant authority for this. The notary completes his duty by embodying that clause, with any mention of burdens which it contains, in the notarial instrument. The principle to be applied must be the same whether the matter interposed between the dispositive clause and the declaration intended to create the real burden be expressed shortly in a few lines, or should occupy pages of the manuscript. In either case the interjected provision or provisions prevent the subsequent declaration from forming part of the dispositive clause of the deed. Accordingly, such recollection as I have of the case after the lapse of upwards of six years, confirmed by the terms of the report, is that the pursuer, unable to say the deed was effectual to form in itself the first step in the creation of a real burden, yet maintained that it was clear the testator meant to do what he had failed to do, and that the defender, as the law agent completing the title, was bound in some way to give effect to this intention, and to see that the legacy in the pursuer's favour was made a real burden on the lands. The deed contained no terms of obligation on the general disponee to constitute a real burden, and no condition that by acceptance of its benefits he should become bound to do so; and my opinion was, and is, that in these circumstances the mere ineffectual attempt by the testator to create a real burden did not infer such an obligation, and that at all events it could not infer any obligation on the law agent there sued. If the judgment of the learned judge, Lord Mure, and of myself, and the general concurrence of my learned brother Lord Adam, be read in the light of what I have now said, I think it becomes apparent that the rubric of the report is correct in stating as merely "Opinion (per the Lord President)" the dicta by his Lordship, which have been so fully discussed in this House and in the Court below. I think that it is clear that his Lordship's views as so expressed were not the ground of the decision of the case, and were not necessary as grounds even of his Lordship's judgment.

On the question itself, which now, I think, occurs for decision for the first time, I agree with the views of my noble and learned friends. I have already adverted to the fact that the disponee has himself recognised the validity of the real burden, or at least has, by the mode of making up his title, accepted the lands expressly under the real burden, which by his act now qualifies his absolute right on the record. I should be very unwilling to hold that in such a case the disponee's own interpretation of the effect of the general disposition, and his election (even were it an election only, and not an obligation) to make the burden real by registration would not be effectual. I agree with my learned brother Lord Rutherfurd Clark in the view which he thus expresses: "He made up his title in such a form as he thought would be effectual to make the burden real. The question is whether the form was sufficient for that purpose, and that question cannot, in my opinion, depend on the rights or obligations of the grantee, but on the legal effects of the title which he has actually made up."

This view is sufficient for the decision of the case. But I must add that I also agree in holding that a general disponee who obtains his right by a conveyance in apt terms qualified or restricted by a declaration that the general disposition is subject to real burdens, is bound to give effect to this declaration, and can be required to do so by having these burdens entered in the Register of Sasines; and adopting the reasons stated by your Lordships and by Lord Rutherfurd Clark in his carefully-reasoned opinion, I also hold that this can be effectually done by a registered notarial instrument under the statute, in the mode adopted in the present case.

Le Breton:—I take it that costs are given against the respondent quâ trustee. He had a judgment of two Courts in his favour, and the case of *Williamson* v. *Begg* (1) justified his proceeding.

Lord Watson:—If the trustee chooses to litigate he must see that the creditors assent to his proceedings, or else must litigate at his own risk.

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(1) 14 Court Sess. Cas. 4th Series (Rettie), 720.

Lord Shand:—Quite so.

Ordered, That the said Interlocutor of the Lord Ordinary in Scotland of the 15*th of November* 1890, *and also the said Interlocutor of the Lords of Session there of the Second Division of the* 17*th of March* 1891 *be, and the same are hereby Reversed; And it is further Ordered, That the Cause be, and the same is hereby remitted back to the Second Division of the Court of Session in Scotland, with directions to assoilzie the Defender (Appellant) from the conclusions of the action, and to find her entitled to her expenses in the Court of Session: And it is further Ordered, That the Respondent do pay or cause to be paid to the said Appellant the Costs incurred in respect of the said Appeal to this House.*

Lords' Journals, 20th July 1893.

Agents for appellant: *Keeping & Gloag, Solicitors, for A. Laurie Kenneway, W.S., Edinburgh.*

Agent for respondent: *Andrew Beveridge, Solicitor, for Welsh & Forbes, Solicitor, Edinburgh.*

[HOUSE OF LORDS.]

JOHN YOUNG AND COMPANY . . . APPELLANTS;

AND

THE BANKIER DISTILLERY COMPANY AND OTHERS . . . . RESPONDENTS.

H. L. (Sc.)
1893
July 27.

River—Right to have Purity of Water Preserved—Mine—Right to Pump Water from Mine into River.

Every riparian proprietor is entitled to have the natural water of the stream transmitted to him, without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court.

The respondents were riparian proprietors on one side of a stream, called the Doups Burn. They and their predecessors had for sixty years used the water of the burn for the purpose of distillation, when the appellants, without any prescriptive right so to do, poured into the stream a large body of water which they pumped up from their mines, which water, if it had been left to the law of gravitation, would have never reached the stream. The respondents did not complain of the increased volume of the stream, but that the foreign water was of a character and quality different from that of the natural stream, and that it prejudicially affected the water of the stream for distillery purposes:—

Held, affirming the decision of the Court of Session (19 Court Sess. Cas. 4th Series (Rettie), 1083), that the respondents were entitled to have the appellants interdicted from discharging the mine water into the stream.

APPEAL from the First Division of the Court of Session, Scotland (1), in an action raised against John Young & Co., the appellants, by the Bankier Distillery Company and others, the respondents, in the Sheriff Court of Stirling, and appealed to the Court of Session by the appellants, when the order for proof was made.

The appellants are lessees of the Banknock Colliery, and pump water from their workings into a stream called the Doups Burn, stated to be the only natural outlet for carrying the water off. The respondents are the proprietors of the Bankier Distillery, and Mr. James Risk heritable proprietor of the mill and mill lands of Bankier, which are occupied by the distillery company, and which are situated on the Doups Burn lower down than the lands of Banknock. The feu under which the lands of Bankier are held excepts minerals, and the appellants are tenants of that reserved coal and also of the adjoining coal seams.

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(1) 19 Court Sess. Cas. 4th Series (Rettie), 1083.

A tributary of the Doups Burn flows past the Banknock Colliery, and after the junction of these two treams the Doups Burn runs along the western side of the lands of Bankier, a portion of the water being used by the respondents for the purpose of distillation. The material question was, whether the appellants were entitled to discharge the pumped water from their coal workings into the Doups Burn, they not being able to establish a prescriptive right to alter the quality of the water.

The respondents stated that the burn had its sources on the higher grounds to the north-west, and in its natural state contained pure and soft water fit for primary purposes; and on account of its softness, particularly suitable for the distillation of whiskey. That it has been used by them and their predecessors for the purpose of distillation, ever since the mill was converted (now more than sixty years ago) into a distillery. That the appellants became tenants of Banknock Colliery in 1887; that since then they had discharged water from their coal workings into a cut leading into the burn at a point above the respondents' property; that this water, besides other imperfections, is very hard, and the natural water is polluted to such an extent as to render it quite unfit for use in the distillation of whiskey; that the respondents were willing for a time to tolerate this pollution for the sake of good neighbourhood, provided the appellants took proper means to prevent the pollution from getting into the water taken to their reservoir, by discharging the pit water lower down the stream than the respondents' intake; that this was done up to 1890, but afterwards, owing to the appellants' cut having fallen into disrepair, the polluted water obtained access to the brewing supply, and the respondents suffered loss; that the defect was repaired, but that owing to this loss the respondents have called upon the appellants to cease discharging water from their workings into the Doups Burn, and demanded damages for their loss; and that the appellants still continue to discharge the water from their mine into the stream in question, and have moreover refused to make any compensation for the damage done. In these circumstances, the respondents, in August, 1891, instituted in the Sheriff's Court, an action to have the appellants interdicted from discharging the water from their coal workings into the Doups Burn, and for payment of £250 damages sustained. Before proof the action was appealed to the Court of Session, and proof was there allowed and taken by Lord M'Laren.

The First Division, on the 20th of July, 1892, gave judgment (1) in favour of the respondents for £25 in the name of damages, and declared the appellants were not entitled to discharge into the Doups Burn water pumped from the coal workings to the injury of the pursuers. The pursuers to have two-thirds of their costs. Their Lordships expressed their opinion, that in order that each owner might get as much out of the stream as should be consistent with the substantial interest of the other riparian proprietors, it was enough if the water was returned to the stream fit for the ordinary purposes of a running stream.

On appeal,

June 12, 13. *The Lord Advocate* (*J. B. Balfour*, Q.C.) (with him *Dickson*, of the Scotch Bar), for the appellants:—

As to the proceedings in the Court of Session, that Court gives its decision upon the facts if the appeal is brought from the Sheriff Court before proof; and an appeal lies from such finding upon the facts to this House. This is the case where, as here, important questions of law are involved. The judges of the Court of Session while holding that there had been no interference with the primary purposes of the water, found that a certain hardness had been communicated to it. By common law the appellants are entitled to pump out this water, although it varies the character of the neighbouring stream, if it does not, as has been found to be the case here, exclude the primary use of the stream. Such an interference with the quality of the water as is here proved is not enough to compel the Courts to wholly stop the working of the appellants' coal mine.

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(1) 19 Court Sess. Cas. 4th Series (Rettie), 1083.

It may be that the appellants cannot quite establish a prescriptive right, but there were pumpings intermittently from 1828, with a break from 1849 to 1869; and the feu of the distillery contains very large reservations.

[Lord Herschell, L.C., that point is not taken on the pleadings.]

They cited: *West Cumberland Iron and Steel Company* v. *Kenyon* (1); *Duke of Buccleuch* v. *Cowan* (2); *Rigby & Beardmore* v. *Downie* (3); *Campbell* v. *Bryson* (4); *Irving* v. *Leadhills Mining Company* (5); *Wilson* v. *Waddell* (6); *Baird* v. *Williamson* (7); *Pennington* v. *Brinsop Hall Coal Company* (8); *Clowes* v. *Staffordshire Potteries Waterworks Company* (9); *Pennsylvania Coal Company* v. *Sanderson* (10); Erskine, 2. 9. 2. and Bainbridge on Mines, 4 ed. 321.

Sir *Horace Davey*, Q.C. (with him, *H. Courthope Monroe*, and *John Wilson*, both of the Scotch Bar), for the respondents:—

The right of the riparian proprietor to the use of the water is absolute; and he is entitled to have it unimpaired in quality and quantity. One riparian proprietor finds that the water of the stream is soft and peculiarly adapted for distillation, and he accordingly places his distillery near the stream. Another riparian proprietor higher up the stream is not at liberty to pollute the water to such an extent as to render it unfit for that which nature has adapted it. And this, although the pollution in question does not cause the water to be unfit for drinking and washing, which may be called its primary use.

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(1) 6 Ch. D. 773; on appeal, 11 Ch. D. 782.

(2) 5 Court Sess. Cas. 3rd Series (Macpherson), 214.

(3) 10 Court Sess. Cas. 3rd Series (Macpherson), 568.

(4) 3 Court Sess. Cas. 3rd Series (Macpherson), 254.

(5) 18 Court Sess. Cas. 2nd Series (Dunlop), 833.

(6) 2 App. Cas. 95; 4 Court Sess. Cas. 4th Series (Rettie), H. L. 29.

(7) 15 C. B. (N.S.) 376.

(8) 5 Ch. Div. 769.

(9) Law Rep. 8 Ch. 125.

(10) 56 American Repts. 89; also reported 86 Penn. Rep. 481; 94 Penn. Rep. 302; 102 Penn. Rep. 70; 113 Penn. Rep. 127.

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He commented on *Baird* v. *Williamson* (1); *Hodgkinson* v. *Ennor* (2); *Durham* v. *Hood* (3); *Blair* v. *Hunter, Finlay, & Co.* (4); *Irving* v. *Leadhills Mining Company* (5), and *Rylands* v. *Fletcher* (6).

The Lord Advocate, replied.

Judgment after consideration.

LORD WATSON :—

My Lords, the facts of this case, which may be shortly stated, give rise to a question of general importance.

The respondents are owners under a feu right which excepts minerals of a parcel of land in the county of Stirling, bounded on the west by a small stream known as the Doups Burn, which has its course from north to south. A distillery was erected about sixty years ago by their predecessors in the feu, and has been in use ever since. The appellants are tenants of the reserved coal below the feu, and of a considerable tract of the adjoining coal seams. In the course of their mineral workings they raise water by pumping from a pit on the north, which they discharge into the Doups Burn before it reaches the respondents' land. So far the facts do not appear to have been disputed in the Court below.

Upon the evidence the learned judges of the First Division have unanimously held, and I have seen no reason to differ from their conclusions: (1.) That the water added by means of the appellants' pumping operations could never reach the burn either before or whilst it flows along the respondents' feu, if it were left to the law of gravitation. (2.) That the water of the burn is pure and soft in quality. (3.) That the added water, though pure, is hard in quality. (4.) That the addition is of volume sufficient to make the water of the burn, as it passes the respondents'

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(1) 15 C. B. (N.S.) 376.

(2) 4 B. & S. 229, at p. 241.

(3) 9 Court Sess. Cas. 3rd Series (Macpherson), 474.

(4) 9 Court Sess. Cas. 3rd Series (Macpherson), at p. 207.

(5) 18 Court Sess. Cas. 2nd Series (Rettie), at p. 841.

(6) Law Rep. 3 H. L. 330.

Lord Watson.

land, hard instead of soft; and (5.) That the hard water so produced is much less suitable for distilling than the naturally soft water of the burn.

From the judgment delivered by the Lord President it appears that the respondents in maintaining their right to have the appellants interdicted from discharging the pit water into the Doups Burn presented their case in two different aspects. In the first place, they complained of the quality of the pit water on the same footing as if it had been water taken from the burn used by the appellants for some secondary purpose, and then returned to the stream in a pure but hard condition. In the second place, they complained that the pit water, which could not find its way to the burn in the natural course of events, had been introduced by artificial means to their prejudice.

Upon the first hypothesis their Lordships' decision was in favour of the appellants. They appear to have affirmed that it is the right of a riparian proprietor not only to use water for secondary purposes, but in so using it to alter its chemical properties to any extent, so long as he does not render it impure, in the sense of being unfit for primary uses. To that view of the law I am not prepared to assent. It was not necessary to decide the point; and its decision is unnecessary for the disposal of this appeal. But seeing that it was decided, I think it right to say that I am not satisfied that a riparian owner is entitled to use water for secondary purposes, except upon the condition that he shall return it to the stream practically undiminished in volume and with its natural qualities unimpaired. I am not satisfied that in returning the water in a state fit for primary uses he has any right to alter its natural character, and so make it unfit for uses to which it had been put, or might be put, by a riparian proprietor below.

Upon the second contention, their Lordships decided against the appellants, and granted interdict accordingly. The ratio of their decision is very clearly and forcibly stated by the Lord President, with whose opinion I entirely concur.

The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in æmulationem vicini. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream.

The law of Scotland upon this point is the same with that of England. In *Blair* v. *Hunter, Finlay & Co.* (1), Lord Gifford said: "Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible." The rule that the upper heritor cannot interfere with the gravitation of the water so as to make it more injurious to the land below is clearly stated by Erle, C.J., in *Baird* v. *Williamson* (2), which was rightly accepted by the First Division as establishing a principle conclusive of the present case. Against that principle the appellants were only able to cite one American case, which I do not notice further, because it was decided on the express ground that in so far as concerns the present question the law of Pennsylvania essentially differs from the law of England.

I therefore move that the interlocutor appealed from be affirmed, with costs.

Lord Herschell, L.C.:—

My Lords, although I was not able to be present during the whole of the argument, I heard the case forcibly presented to your Lordships on behalf of the appellants, and I desire to add my complete concurrence with the views which have been expressed by my noble and learned friend who has just addressed your Lordships.

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(1) 9 Court Sess. Cas. 3rd Series (Macpherson), at p. 207.

(2) 15 C. B. (N.S.) at p. 392.

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LORD ASHBOURNE, concurred.

LORD MACNAGHTEN :—

My Lords, this case has been very fully and ably argued on the part of the appellants. It is said to be a case of general importance, and it certainly contains an element of novelty. But the question involved in it is not, I think, attended with any difficulty.

The law relating to the rights of riparian proprietors is well settled. A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court.

The respondents are riparian proprietors in regard to the Doups Burn. They carry on the business of distillers on their property by means of a distillery which has been in work there for the last sixty years. The appellants, without any prescriptive right so to do, are pouring into the burn a large body of water which they pump up from their mines. The respondents do not complain of the increased volume of the stream. The increase in itself is no disadvantage to them. But they say that the foreign water is of a quality different from that of the natural stream, and that it prejudicially affects the burn water for distilling purposes. The appellants insist that they are entitled to continue their operations, and therefore, although the respondents can, and do at present, protect themselves by taking their supply at a point higher up the stream, it is necessary to determine the question of right.

It is proved that the water of the burn flowing past the respondents' property is less suitable for distilling purposes

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than it used to be. It used to be very soft water. It has been made very hard. The appellants have thus seriously impaired the manufacturing value of the burn. They have in fact destroyed its special value. Their answer is that the ingredient introduced is only water—and very good water too. It may be very good water for some purposes. But that is not much satisfaction to the respondents if it will not do for the one purpose for which they want to use it. It seems to me that the appellants have no more right to pour into the burn foreign water which has the effect of changing its natural quality than they would have to put into it some chemical substance which would produce a similar alteration.

Then the appellants urged that working coal was the natural and proper use of their mineral property. They said they could not continue to work unless they were permitted to discharge the water which accumulates in their mine—and they added that this water-course is the natural and proper channel to carry off the surplus water of the district. All that may be very true; but in this country at any rate it is not permissible in such a case for a man to use his own property so as to injure the property of his neighbour.

I have therefore no doubt that the appellants are not justified in pouring into the burn foreign water to the injury of the respondents.

Agreeing with the learned judges of the First Division in this, which is the ground of their decision, I am compelled to add that I am unable to concur in one proposition which their Lordships lay down as a proposition of law. Their Lordships hold that if the particular change in the quality of the Doups Burn of which the respondents complain had been effected, not by the introduction of foreign water, but by some manufacturing process employed by an upper proprietor entitled to the use of the flowing stream, the respondents would have been without remedy. It is not necessary to decide the point. But as at present advised, I am disposed to think that if the appellants had abstracted the natural water of the burn and returned it to the stream so altered in quality or character as to be materially less serviceable for the reasonable use of the respondents, though still fit for primary or ordinary uses, they would have been equally liable to an interdict, just as they would be liable if they were to return water unchanged in its chemical constitution, but so changed in the temperature as to be injurious to a lower riparian proprietor.

I therefore concur in the motion which has been proposed.

Lord Morris, concurred.

Lord Shand :—

My Lords, I concur in the opinions of my noble and learned friends. I fully share the doubts which have been expressed as to the right of any upper proprietor so to use the water of a stream as to affect injuriously its natural quality as restored to the bed to the prejudice of the lower riparian owner, even though the water restored should be fit for ordinary primary purposes. It is true that in the cases which have hitherto occurred, both in Scotland and in this country, where the complaint has been of pollution by an upper heritor, the claim made has been that the water shall be transmitted in a state of such purity as to be fit for the use of man and beast, and the other primary uses of running water, and, that where no prescriptive right tc pollute has been proved, decree has been given to this effect. The object of the pursuers in these cases was served by having the pollution put down and their right to the transmission of water fit for primary purposes declared. These cases do not, however, establish the proposition that if a running stream should possess natural qualities which may be valuable to lower proprietors for some manufacture or otherwise, an upper proprietor using the water for his own purposes may deprive the water of these qualities, provided he restore it fit for ordinary primary uses. There seem to be strong reasons for holding that the lower owner is entitled to have the water transmitted to him with its natural qualities unimpaired, and that the principle of the cases which have given effect to the claim to have the water transmitted unimpaired in quantity and fit for primary purposes would support that view. But, at all events, I am at present unable to assent to the view expressed by the learned judges in the Court of Session.

I am, however, clearly of opinion that while a lower proprietor must submit to the flow of water coming down upon his lands by the natural force of gravitation, he is not bound to receive water brought up from a depth by artificial means, such as pumping. The appellants would, no doubt, be entitled in mining to excavate and remove the strata of minerals in the lands leased to them to any depth practicable to which they might choose to go. If in doing so in the ordinary course of working they should happen to tap springs or a water waste from which the water by gravitation rose to the surface and flowed down to a lower proprietor's land, this must be submitted to; but the mine owner is not entitled by pumping to increase this servitude or burden on one unwilling to submit to it by pumping up water which might never rise to the surface, or which might only do so more gradually and slowly and in much smaller volume. This is, I think, the rule or principle on which the Court decided the case of *Baird* v. *Williamson* (1), the decision in which has been approved of by your Lordships.

I know of no distinction between the law of Scotland and the law of England in the class of questions relating to the common interest and rights of upper and lower proprietors on the banks of a running stream. The whole series of authorities in both countries seem to be entirely against the claim or pretension of the appellants for their own profit to pump up water from the depths of their pit and send it into the stream, greatly enlarging the quantity of water in the bed and impairing its quality. In these circumstances the defenders' counsel invited your Lordships to follow the decision in an American case decided in the Supreme Court of Pennsylvania—the case of *Pennsylvania Coal Company* v. *Sanderson* (2) decided in February, 1866. In that case undoubtedly the Court held that the owners of a mine were entitled to pump up water from the low strata of the mine, and to send it into an adjoining stream, although the quantity of the water was thereby increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian

(1) 15 C. B. (N.S.) 376.

(2) 56 American Repts. 89.

owners. The case had been twice previously before the Court, and on both occasions the judgment was given against the mine-owner. On the third occasion, which occurred in consequence of a third trial to assess the damages, the jury found a very large sum due to the lower owner; but the verdict was quashed, and the whole case reconsidered with reference to the legal rights of the parties, and with the result I have stated. In a Court of seven judges there were three who dissented from the judgment, including the Chief Justice of the State. This circumstance and the grounds of the judgment seem to me to be sufficient to deprive the case of any real weight. These grounds appear to me from a perusal of the judgment to be fairly stated in the head-note as follows: "The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must ex necessitate give way to the interests of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal." I shall only add, that while the enormous value of the mining interests in the district of Pennsylvania, from which the case came, and which is fully explained in the judgment, might have formed a good reason for appealing to the legislature to pass a special measure to restrain any proceeding by interdict at the instance of surface proprietors, and to confine them to a right to damages only for injury sustained, that value could in my opinion afford no good legal ground for allowing the proprietor of a mine so to work his minerals for his own profit as to destroy or greatly injure his neighbour's estate by subjecting it, by means of artificial operations, to the burden of receiving water enlarged in quantity and destroyed in quality without payment of compensation or damages for the injury done. The case has no application to the present because the decision was based on special circumstances as to the great relative value of the minerals as compared with the surface in the district; and because in any view the decision seems to me to have been making law rather than inter-

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preting the law, so as to give effect to sound, just, and well-recognised principles as to the common interest and rights of upper and lower proprietors in the running water of a stream.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 27th July 1893.

Agents for appellants: *Grahames, Currey, & Spens, for Webster, Will, & Ritchie, S.S.C., Edinburgh.*

Agent for respondents: *Andrew Beveridge, for G. Monro Thomson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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TRUSTEES OF THE CLYDE NAVIGATION . . . . APPELLANTS;

AND

LORD BLANTYRE . . . . RESPONDENT.

River—Pier—Liability to Repair—Undertaking—Special Acts of the Clyde Navigation Trustees, Construction of.

By the Clyde Navigation Consolidation Act, 1858 (21 & 22 Vict. c. cxlix.), s. 76, the undertaking of the Clyde Trustees shall in terms of the recited Acts (which include 3 & 4 Vict. c. cxviii.) consist of (inter alia), "The construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry slips, approaches, embankments or river dykes, and all other works and improvements shewn and described on the several plans and sections referred to in the recited Acts, and thereby authorized to be made and maintained." By the 11th section of 3 & 4 Vict. c. cxviii. the trustees amongst other works were authorized to reconstruct the piers of the ancient ferry of Erskine. Sect. 50 enacted, that "the said quays should, at the expense of the said trustees, but with the consent of the proprietors, be repaired, lengthened, altered, or reconstructed," where such repair, lengthening, altering, or reconstruction should be rendered necessary by the works carried out by the trustees for deepening the river.

The trustees having enlarged and reconstructed the piers of Erskine ferry, one of the piers was damaged by a ship, and the proprietor brought an action for a declaration that the trustees were bound to repair the pier as part of their undertaking. The trustees denied liability unless for damage done by their works :—

Held, reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie) 197), that the ferry was not part of the undertaking of the trustees, and they were not bound to repair the damage.

APPEAL from a judgment of the First Division of the Court of Session, Scotland. (1)

This was an action raised by Lord Blantyre, the respondent, against the trustees of the Clyde navigation, the appellants, for declarator that the appellants were bound to maintain and keep in repair the north and south quays, &c., of Erskine ferry, and all other works at or connected with the said ferry, made, executed, and constructed under the powers, &c., contained in 3 & 4 Vict. c. cxviii. and the 21 & 22 Vict. c. cxlix. then and from time to time as might be found necessary or expedient.

Erskine ferry was of ancient date, and the sole property of the respondent. Its quays had been since 1840 reconstructed and enlarged by the appellants, the respondent supplying some of the materials. In January, 1889, one of the piers was struck by a passing steamer and damaged. The respondents denied liability, contending that Erskine ferry, piers, &c., formed no part of their undertaking.

The material sections of the various Acts involved are given by the Law Peers in their opinions.

1890. The Lord Ordinary (Kinnear) granted the declarator as prayed for; and on the 6th of December, 1890, his judgment was adhered to by the First Division. (1)

On appeal,

June 19, 20. *The Solicitor General for Scotland* (*Asher,* Q.C.) and *Ure* (of the Scotch Bar) were heard for the appellants.

Sir *Horace Davey,* Q.C., and *David Dundas* (of the Scotch Bar), were heard for the respondent.

Judgment after consideration.

LORD HERSCHELL, L.C. :—

My Lords, Lord Blantyre, who is the respondent in this appeal, is the owner of considerable property abutting upon the river

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(1) 18 Court Sess. Cas. 4th Series (Rettie) 197.

Clyde, and he owns certain ferries, and amongst them a ferry known as Erskine ferry, which has long been in use and in connection with which there has long been a pier or quay on either side of the river. Owing to the pier or quay on the south side of the river having been struck by a passing vessel considerable damage was done. The respondent insisted that the appellants, the Clyde Trustees, were bound to repair the damage which had thus been done to the pier. The appellants denied that they were under any such obligation. Thereupon, the present action was brought by Lord Blantyre to enforce his right to have the pier repaired by the appellants. The learned judges below held that this obligation on the part of the Clyde Trustees existed, and that the action was well founded. The point now comes before your Lordships for decision.

The respondent rested his claim mainly, if not exclusively, upon a clause to be found in the Clyde Trustees Act of 1840, the 11th clause of that Act, and also upon the 76th clause of their Act of 1858. By the 11th clause of the Act of 1840 it was provided in these terms: "That the trustees appointed by or under this Act shall be and they are hereby empowered and authorized" "not only to execute and continue the several works authorized by the said recited Acts" (that is, by the Clyde Trustees' prior Acts), "but also under the provisions and restrictions hereinafter enacted, to make, execute, construct, finish, maintain, and keep in repair the additional works upon, in, or along the river, and in connection with the said harbour, delineated or represented on the map or plan hereinafter mentioned." The case for the respondent was this, that the map or plan, the reference to which I have just read, shews that amongst the works to be executed by the Clyde Trustees was an alteration of the piers of Erskine ferry, and that when this alteration had been effected under the provisions of the clause which I have read in the Act of 1840 an obligation arose to keep in repair, in the terms of the statute, the additional work so executed by the trustees.

My Lords, the plan no doubt shewed certain works which it was contemplated were to be executed by the Clyde Trustees; and there can be no doubt, further, that it sanctioned the removal by the Clyde Trustees of so much of the piers of Erskine ferry as extended into the river beyond what was shewn on the plan as the intended line of the river, and, further, that it authorized and sanctioned an alteration of the level of those piers when a portion of them had been removed, so as to make them useful and effective in connection with the contemplated altered condition of the river. But I am at a loss to find in the clause which I have read any obligation imposed upon the Clyde Trustees to execute those works. It can hardly be contended that the Act imposed upon them an absolute obligation to execute all the works, authority for which was given by the Act coupled with the plan; and the language is as plainly authorizing and empowering as language can possibly be. There is no expression to be found which indicates an absolute obligation under all circumstances and in all events to execute the works; nor am I able to find any distinction which would justify the assertion that they were bound to execute the works contemplated with regard to these piers unless they were under statutory obligation to execute, as shewn upon the plans, every one of the works so shewn. My Lords, the words of the statute are, "that the trustees are hereby empowered and authorized" "to make, execute, construct, finish, maintain and keep in repair." Taking the words "keep in repair," upon which so much has been rested, there are no more obligatory words in relation to the keeping in repair than there are in relation to the making and executing. Therefore, so far as the question turns upon the provisions of this section, it seems to me that the obligation contended for could only be established if it was made out, not only that the work to be done to these piers was a work authorized within the meaning of this section, but that all the works authorized by this section were to be in all events executed by the trustees and thereafter kept in repair.

My Lords, in 1858 the Act was passed upon the 76th section of which so much reliance has been placed. But before I invite your Lordships' attention to the language of that statute it is necessary to state what had taken place in the interval between the passing of the Act of 1840 and the passing of the Act of

1858, and to call your Lordships' attention also to certain provisions contained in the Act of 1840 for the protection of Erskine ferry. I have pointed out to your Lordships that, as I read the statute, the 11th clause imposed no obligation upon the Clyde Trustees in relation to Erskine ferry; but the 50th and following sections of the Act of 1840 undoubtedly did impose an obligation upon the trustees—such an obligation as one would have expected to find. Sect. 50 enacted, "That nothing contained in this Act or in any of the said recited Acts shall affect or be construed to affect in any degree the established ferries of Govan Renfrew, Erskine West ferry," and another ferry, which is mentioned, "but the same shall be used and enjoyed in as ample and beneficial a manner as in times past"; and also "that a reasonable and sufficient space unenclosed by walls, dykes, jetties, and other works shall be left on each side of the quays of the said ferries," "and the said several quays shall at the expense of the said trustees (but with the approbation and consent of the proprietors)" "be repaired, lengthened, altered, or reconstructed according to the advice and report of civil engineers of eminence where such repair, lengthening, alteration, or reconstruction shall be rendered necessary by the works carried on by the said trustees for deepening the river under and by virtue of the said recited Acts or this Act, and so as the said ferries and quays shall be made as convenient, and the working thereof as easy as before or as nearly so as may be."

Now, my Lords, there is there a provision which imposes an obligation in relation to Erskine ferry which is inserted for the protection of the owner of Erskine ferry, and which, so far as I can see in the Act of 1840, alone imposes any obligation in relation to that ferry or the works in connection with it, and as I read the section the obligation imposed is ample for the protection of the proprietor of the ferry. Unless and until any works were executed by the Clyde Trustees which made the ferry less convenient than before, it was only reasonable that they should have no obligation in relation to it. Here the quay was the private property of Lord Blantyre. The Clyde Trustees had no right to interfere with its management or to oust him from the possession of it. All that they were entitled to do was to make certain alterations in its length and its inclination; and they were under this obligation, that whatever works they executed upon the river, even if they did not touch the pier at all, they were bound to make that pier as convenient for ferry purposes as it had been before.

In the year 1854, when the works of the Clyde Trustees for deepening and improving the navigation of the river were proceeding, communications passed between Lord Blantyre and the Clyde Trustees with reference to their obligations in respect of the pier, and ultimately it was agreed between the parties that the pier with which we are dealing should be reconstructed. It was made much broader than it had been before; in short, a new and an enlarged pier as regards its breadth was built, but the pier was not so long as it had been before; it did not even extend up to the new river line; whereas the old pier extended considerably beyond the new river line. In consideration of the fact that the new pier was to be made more commodious than it had been before in respect of its breadth, some of the material was provided by Lord Blantyre. This new pier had been completely constructed prior to 1858, and I apprehend that the new pier remained, as the old pier was, the property exclusively of Lord Blantyre, free from any interference by the Clyde Trustees, except such interference as necessarily followed from the works executed by them in improving the navigation of the river.

In the year 1858, the next Act which your Lordships have to consider was passed. By sect. 76 of that Act the undertaking of the Clyde Trustees was defined in these terms: " Subject to the provisions of this Act and of any agreements authorized or confirmed by the recited Acts or this Act," " the undertaking of the trustees shall in terms of the recited Acts consist of the deepening, straightening, enlarging, widening or confining, dredging, scouring, improving, and cleansing the river and harbour until a depth of at least seventeen feet at neap tides has been attained in every part thereof; the altering, directing, or making the channel of the river through any land, soil or ground, part of the present or former course or bed of the river; the forming and erecting on both sides of the river of such jetties, banks, walls, sluices, and works, and such fences for making, securing, continuing and maintaining the channel of the river within proper bounds as the trustees shall think necessary;" "the cleansing, scouring, and opening any other streams, brooks, or watercourses which now fall into the river, and the digging and cutting the banks of the same for improving the navigation of the river; the digging, cutting, removing, carrying away and using such earth, gravel, stones and other materials in, upon or out of the said land, soil or ground as the trustees shall think fit either for improving the navigable channel of the river or for bringing in any other streams, brooks or watercourses to the river, or for bringing up a greater quantity of tidal water in the river; the erection, repair and maintenance of wharfs, transit sheds, warehouses, cranes, workshops, and other works connected with the river and harbour;" "the construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry slips, approaches, embankments, or river dykes, and all other works and improvements shewn and described on the several plans and sections referred to in the recited Acts and thereby authorized to be made and maintained." Now, the words upon which reliance is placed are these, "the construction and completion of" "quays" "and all other works and improvements shewn and described on the several plans and sections referred to in the recited Acts." It is said that this pier or quay was shewn on those plans, and that therefore it became a part of the undertaking of the Clyde Trustees; and then, supposing that to be established, reliance is placed upon the words which follow: "and the repair, maintenance, and improvement of the whole of the said works from time to time as may be found necessary or expedient."

Now, my Lords, no doubt that section would vest in the trustees or continue vested in them all such powers as they had under any of the prior recited Acts in relation to the matters mentioned, in so far as those powers were still subsisting and had not lapsed in point of time. There can be no doubt therefore that the authority conferred upon them by any prior Act which was still operative continued under this Act. But, my Lords, for the reasons which I have already expressed to your Lordships, I am unable to entertain the view that the fact that the prior

Act gave authority, for the purpose of improving the navigation of the river, to remove the ends of these piers and to alter their inclination made these piers a part of the undertaking of the Clyde Trustees. The power to execute certain works in relation to them was no doubt part of the undertaking; but that the piers themselves, which were the exclusive property and under the exclusive management of Lord Blantyre, became part of the Clyde Trustees' undertaking, I am, I confess, quite unable to see. And it is to be observed that the obligation to repair is only in these terms: "the repair, maintenance, and improvement of the whole of the said works from time to time as may be found necessary or expedient;" indicating to my mind clearly, that as to these works which the trustees were authorized to execute it was left to them to determine what part of their undertaking should be executed at what particular time, what part it was expedient in the public interest to continue, what part it was expedient to abandon, and what part it was necessary or expedient to repair, maintain, and improve, because it is to be observed, that if there be an obligation to repair, it must be argued also that there is an equal obligation to improve, inasmuch as the language used in relation to both these matters is precisely the same.

My Lords, in the year 1864 the respondent was not satisfied with the condition of the pier, and he claimed that it should be lengthened so as to stretch much further into the river than it then did. The right to have the alteration made was rested by him, and properly rested, upon sect. 50 of the Act of 1840, to which I have called attention, or perhaps it would be more accurate to say upon the corresponding section (I think it is No. 88) in the Act of 1858, because, the Act of 1840 having been repealed, the provision to which I have referred for the protection of Erskine ferry was re-enacted in terms in the subsequent statute of 1858. In the year 1864 Lord Blantyre brought an action for the purpose of enforcing this right, and ultimately his right was maintained in this House (1), and the limit to which the piers were to extend into the river was fixed by a skilled person to whom there had been a remit from the Court

(1) March 21, 1884.

below, and fixed in relation to the rights conferred upon Lord Blantyre by sect. 50 of the Act of 1840, or by sect. 88 of the Act of 1858. In consequence of the view adopted by the engineer to whom the matter was remitted, a decree in accordance with which was afterwards made by the Court, the pier was lengthened and made to extend into the river to about the river line shewn upon the plan of 1840; but the contention of Lord Blantyre was that it ought to have extended beyond that line.

Now what obligation is there on the part of the Clyde trustees to repair that pier thus extended as I have described? I have said that it has been rested upon the statutes of 1840 and 1858. I am unable, with all respect to the learned judges in the Court below, to find in either of those statutes any such obligation. When the words in sect. 50 of the Act of 1840 and in the corresponding section of the Act of 1858 are carefully examined, they seem to me strong to negative the existence of such a right, inasmuch as there is a provision for repairing the quay or pier at Erskine ferry, but the obligation is confined to those cases in which the ferry had been or should thereafter be prejudicially affected by the navigation works which the trustees were authorized to execute.

My Lords, Lord Kinnear (the Lord Ordinary) expressed the opinion "that the quays so constructed are part of the undertaking of the trustees, and must be maintained as such. Everything they were authorized to do by the Act of 1840 was a purpose of the Act and a part of the undertaking. The analogous provisions of the Railways Clauses Act have been so construed; and although the language of the statutes is not identical the principle of construction adopted in these cases appears to be applicable." I think it right to say, with all respect, that I do not think that any light is thrown upon this case by the decisions referred to of *Wilkinson* v. *Hull Railway Company* (1) and *Lord Beauchamp* v. *Great Western Railway Company* (2), and that those decisions upon the construction of the Railways Clauses Act do not in my opinion at all assist the contention of the respondent.

Lord McLaren, in delivering the judgment of the Inner

(1) 20 Ch. D. 323.

(2) Law Rep. 3 Ch. 745.

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TRUSTEES OF THE CLYDE NAVIGATION v. LORD BLANTYRE.

Lord Herschell, L.C.

House, took the view that the 50th section of the Act of 1840 was to be regarded as supplementary and auxiliary to the 11th section—a view in which I am unable to concur. As I have already said, I think that the 11th section conferred full powers upon the trustees in relation to the navigation of the river, but did not impose any obligation upon them to execute any works in connection with this pier. The 50th section did impose a distinct obligation upon them in favour of the respondent. The learned Lord was not prepared to maintain the contention "that the trustees were bound to maintain in perpetuity every piece of work which they might construct in accordance with their powers." He considered that there was no such obligation "where no private interest was concerned." "But," he said, "where the work executed is in the nature of a substituted pier intended to give the owner of a ferry the same kind of accommodation which he had before, but in a form more convenient for the navigation of the river, the trustees cannot in our opinion separate the obligation to maintain from the obligation to execute." But, my Lords, for the reasons which I have given I can find no *obligation* to execute works save under the 50th section of the Act of 1840; I find no such obligation in the 11th clause, and therefore I do not think that it is a question of separating the obligation to maintain from the obligation to execute, but of shewing that the obligation to execute, which, as I have said, in my view, arises only under the 50th section, carries with it also an obligation to repair, when the section does impose an obligation to repair, but only for a limited purpose and in limited terms.

My Lords, for these reasons I am, with all respect for the learned Lords in the Court below, unable to adopt the view which found favour with them, and I move your Lordships that the judgment appealed from be reversed.

LORD WATSON:—

My Lords, in January, 1889, a steam vessel, on her way down the Clyde, ran into and injured the south pier or quay of Erskine ferry, which is the property of Lord Blantyre, the respondent. The appellants declined to repair the damage, whereupon this action was brought against them by the respondent, for declarator to the effect that they are bound, at their own expense, to maintain and keep in repair the quays or slips on the north and south sides of the river at Erskine ferry. The First Division of the Court, affirming the judgment of the Lord Ordinary (Kinnear), have given the respondent decree of declarator as craved, mainly upon the ground that these quays, though belonging to the respondent, have been made part of the statutory undertaking with which the appellants are entrusted, and as such must be maintained and repaired by them in all time coming.

The controversy thus raised necessarily depends upon the terms of the Acts by which the Clyde Navigation Trust has been constituted. I have come to the conclusion that these statutes have been misconstrued by the learned judges of both Courts below. The reasons assigned in the note of the Lord Ordinary, and in the opinion of Lord M'Laren, who delivered the judgment of the Inner House, appear to me to ignore the essential distinction which the statutes make between works necessary to the undertaking, which the trustees are authorized to execute, at their own hand, and at their own discretion, and works which consist in the alteration of private property, not required in the interest of the undertaking, but of the proprietor, and as to which they have no discretion, being compellable to execute such works at the instance of the proprietor.

Sect. 76 of the Act of 1858 defines the undertaking of the trustees. It is only necessary to refer to that portion of it which is said to embrace the respondent's quays, piers, or slips at Erskine ferry. It runs thus: "The construction and completion of the several wet docks or tidal basins, quays, wharfs, or ferry slips, approaches, embankments or river dykes, and all works and improvements shewn and described on the several plans and sections referred to in the recited Acts, and thereby authorized to be made and maintained; and the repair, maintenance, and improvement of the whole of said works from time to time, as may be found necessary or expedient, and subject to the provisions of this Act and the Acts herewith incorporated, the trustees are hereby authorized and empowered to carry on and complete the whole, or such and so many of the said works as to them from time to time shall seem expedient." The whole tenor of the clause indicates the understanding of the legislature that the various authorized works which are particularly described were works within the control and discretion of the trustees, in this sense, that the latter were free to maintain, or not to maintain, to repair or not to repair, to improve or not to improve them, as they might judge expedient, owing to financial or other considerations. It creates no obligation to execute works in favour of the respondent or any third party.

The respondent relied upon the provisions of sect. 11 of the Act of 1840 as establishing that the piers in question are works shewn and described in plan and section, within the meaning of the Act of 1858. By that clause the trustees are empowered and authorized to execute, maintain, and keep in repair certain additional works delineated on a map or plan and sections deposited with reference to the Act. The plan shews the river lines within which the trustees were authorized to remove all obstructions and dredge to the required depth; and it also shews that a portion of each pier at Erskine ferry extends into the river beyond these lines, and was therefore liable to removal. There is a power to deviate from these lines to an extent not exceeding forty yards, but it has not been exercised at that part of the river. The cross-sections indicate those portions at the end of each pier which the trustees are authorized to remove; and also that the portions which they were not authorized to remove were to be reduced in level by the trustees, in order to afford suitable access to and from the ferry-boat.

The statutory power and authority of the trustees with respect to the removal of these piers within the river lines of 1840 has been exhausted for more than thirty years. There is at present no work which they could execute in terms of that authority if they were so inclined. The existing piers, and notably the south pier, are not those shewn in the plan and sections incorporated with the Act of 1840, but new structures, which the trustees have either erected, or aided in erecting, not by virtue of any discretionary power conferred upon them by sect. 11 of that Act, but under the compulsion of clauses inserted in it, and also in the Act of 1858, in the interest of the respondent and for the protection of his private property. The appellants have no power or authority whatever in regard to these piers, which they can neither use nor interfere with. They stand upon foreshore of which the respondent is feudal owner, and he can alter or reconstruct them in any way he may think fit, so long as his operations do not interfere with the navigable waterway of the Clyde, which it is the duty of the trustees to maintain.

Beyond what is contained in sect. 11 and relative plan and sections, the Act of 1840 makes no provision with respect to the south pier of Erskine ferry. Sect. 51 provides for the alteration and reconstruction of the north pier whenever the trustees cut off any part of it, so as to bring it into a convenient line with the pier and quay on the south side. Sect. 50 contains provisions applicable to other ferries, which were extended to Erskine ferry by sect. 88 of the Act of 1858. The latter clause enacts that nothing in the Act contained shall affect the established ferry of Erskine, and also that its quays shall be repaired, lengthened, altered, or reconstructed at the expense of the trustees according to the advice and report of civil engineers of eminence "where such repair, lengthening, alteration or reconstruction shall be rendered necessary by the works carried on by the trustees for deepening the river under and by virtue of the recited Acts and this Act."

Before the Act of 1858 was passed the trustees had removed that part of the south pier which lay to the north of the river line of 1840. They had also with the consent of the respondent, but without prejudice to any claim he might have against them, removed a considerable portion of the pier to the south of that line; and had constructed a new pier with materials partly contributed by the respondent which did not come up to the river line, and was of much larger dimensions than the pier shewn in the plan and sections. In 1864 the respondent brought an action against the trustees which was finally disposed of by this House in 1884, in which he obtained a decree ordaining the trustees to construct what was practically a new south pier. His claim was preferred and maintained in respect of the obligation laid upon the trustees by sect. 88 of the Act of 1858; and it was upon that footing that the House gave judgment in his favour.

The provisions of sect. 88 do not assist the respondent's argument that the trustees are bound to maintain and keep in repair the quays of his ferry. On the contrary, they appear to me to negative that contention by expressly providing that the trustees shall be bound to repair if and when repair is rendered necessary by their operations upon the river. The existing south pier, which has been altered and reconstructed in compliance with the judgment of 1884, is in no statutory sense an authorized work either under the Act of 1840 or that of 1858. It is not shewn, and could hardly have been shewn on the plans and sections incorporated with the earlier of these Acts, seeing that its design and dimensions were then unknown, and could not be ascertained until the trustees' future operations on the alveus of the river had so nearly approached completion as to enable an engineer to judge what structure would be suitable in the altered condition of the tideway.

The Lord Ordinary appears to rest his judgment upon the opinion which he entertained that the "quays in question are among the works shewn and described on the parliamentary plans and sections of 1840, and part of the undertaking defined by the 76th section of the Act of 1858." Lord M'Laren, speaking for himself and the other judges of the First Division, goes a good deal farther. He lays it down as law that "where the work executed is in the nature of a substituted pier intended to give the owner of a ferry the same kind of accommodation which he had before, but in a form more convenient for the navigation of the river, the trustees cannot in our opinion separate the obligation to maintain from the obligation to execute." I cannot assent to the rule thus enunciated, which, so far as I know, has no authority to support it. I should have thought that in all such cases the burden of maintenance and repair must be upon the dominus of the subject, unless it is shewn to have been shifted to the undertakers by the terms of their statute.

For these reasons I concur in the judgment which has been moved.

LORD MORRIS:—

My Lords, I concur.

LORD SHAND:—

My Lords, I so entirely agree with the observations which have been made by your Lordships who have preceded me that I shall only add a few remarks. It is, I think, important to notice that the claim made by the respondent is certainly unusual, and indeed extraordinary, in this sense, that it is a claim that the owner of a property who is in full enjoyment of it and deriving its entire profits shall have that property maintained in perpetuity at the expense of other parties, who receive no benefit or return from it. The demand made in the conclusions of the summons is a very wide one; for although the occasion for the action being raised was the circumstance that the piers of Erskine ferries had been injured on two occasions by ships which had come in contact with them, what is asked is that it shall be declared that there is a perpetual obligation resting upon the Clyde Trustees "to maintain and keep in repair" the quays on the north and south sides of the river Clyde—a claim which includes all repairs which may be necessary in all time coming caused by the ordinary ferry traffic and even wear and tear occurring from weather or otherwise. The Clyde Trustees have no right of property whatever in the piers. They did not make any purchase or acquire any land belonging to the respondent for the purposes of the ferries or piers. On the contrary, the respondent remains the sole and uncontrolled proprietor; and, as your Lordships have observed, he and his successors are entitled to make such changes on the piers as they may think fit, which are consistent with their obligation to maintain the ferries, and not injurious to the navigation of the river. I should say it is obvious that an obligation such as is alleged must be very clearly made out. It is not to be readily or easily inferred by implication. One would expect that an obligation of this kind by which the

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trustees should be bound to maintain the private property of another over which they had no control would be imposed by the use of express language to that effect. It has not been suggested that there is anything of that kind in the statutes; and I agree with your Lordships in thinking that even by implication there is not to be found, in the sections which have been founded upon, any such obligation. There is what might naturally be expected in a case of this kind—an obligation that in so far as the operations of the Clyde Trustees on the bed of the river should prove injurious to the piers, and works might be required to remedy such injury, those works should be done by the Clyde Trustees. In sect. 50 of the Act of 1840, which I think repeats a similar section in the Act of 1825, and which is again, I think, in almost identical terms repeated by sect. 88 of the Act of 1858, there is the obligation that the pier of the west ferry of Erskine shall be repaired, lengthened, and reconstructed where such works shall be rendered necessary by the works which have been carried on by the trustees for deepening the river. The section is entirely silent, so far as regards any general obligation of maintenance and repair. The obligation is to repair, alter, and reconstruct when the trustees' operations on the river render it necessary, and there it ceases.

My Lords, that being the only obligation to be found in the statutes, in express terms, the remaining question is, Is there anything in any of the other sections of the Acts which by implication imposes such an obligation as to warrant the respondent's claim? The two sections which have been referred to, and which the Lord Chancellor has so fully narrated, are sect. 76 of the Act of 1858 defining the undertaking, and sect. 11 of the Act of 1840. Now, with regard to the first of these sections, sect. 76, it is true that the construction and completion of "quays, wharfs, ferry slips," and other works, the execution of which the statute contemplated and authorized, are expressly mentioned, and that the clause towards the close includes "the repair, maintenance, and improvement of the whole of the said works from time to time as may be found necessary or expedient." The quays, wharfs, and ferry slips are included in the same section with a great many other works, indeed with every other class of works which the trustees are authorized to perform and execute. First of all, there are operations in the bed of the river and similar works; then the clause authorizes the trustees to make and maintain "wet docks or tidal basins, quays, wharfs, ferry slips, approaches, embankments," and so on. If the argument be good, that there was an obligation upon the trustees to keep the slips and quays belonging to the respondent in repair after they had been reconstructed, it would be very difficult to say that the same obligation must not apply to all the other subjects mentioned in this clause even where the trustees thought it undesirable or inexpedient to continue particular works which in their opinion were no longer necessary or useful. My Lords, I agree with your Lordships that while the clause as a whole defines the undertaking it is so defined by enumerating works authorized, and not by creating obligations either to execute or to maintain works. The language used enables or authorizes the trustees to carry out these particular works as part of their undertaking; and the whole is qualified by the words at the conclusion, "from time to time as may be found necessary or expedient."

My Lords, in like manner sect. 11 of the Act of 1840 appears to me to be of the same character. There is there again a power with reference to the statutory map or plan, if the trustees desire it, to shorten the piers and to reconstruct and repair them. It might have been found as the trustees proceeded with their operations that no such shortening or reconstruction or repair was required, and, if so, they certainly were not bound to execute the work they did; but if they do interfere with the piers and reconstruct them, which is a matter they are empowered to do, I do not find any obligation of future maintenance.

The Lord Chancellor has observed that Lord Kinnear (the Lord Ordinary) put the point upon which he thinks the case turns in a sentence to this effect: "The opinion which I have formed is that the quays so constructed are part of the undertaking of the trustees and must be maintained as such. Everything they were authorized to do by the Act of 1840 was a purpose of the Act and a part of the undertaking." My Lords, in the last of these sentences I entirely concur; what they were

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authorized to do for the purposes of the Act was a part of the undertaking; but, with great deference to his Lordship, I do not think it follows from the power to construct the quays—which power is given as part of the undertaking—that any obligation of maintenance is to be inferred. I agree in thinking there is no obligation of maintenance in either of the clauses founded on, and that, consequently, the decision of the Court of Session should be reversed.

Ordered, That the said interlocutors of the Lord Ordinary in Scotland, of the 19*th and* 20*th of July,* 1889, *also the said interlocutor of the Lords of Session there, of the First Division, of the* 17*th of December,* 1889, *also the said interlocutor of the said Lord Ordinary there, of the* 14*th of April,* 1890, *and also the said interlocutors of the said Lords of Session there, of the First Division, of the* 5*th of December,* 1890, *and* 14*th of May,* 1892, *be, and the same are hereby reversed: Further Ordered, that the cause be, and the same is hereby remitted back to the First Division of the Court of Session in Scotland, with directions to assoilzie the defenders (appellants) from the conclusions of the summons, and to find them entitled to their expenses in the Court of Session: And it is further Ordered, that the respondent do pay or cause to be paid to the said appellants the costs incurred in respect of the said appeal to this House, and repay to the appellants any expenses already paid to him by the appellants under the interlocutors reversed.*

Lords' Journals, July 24th, 1893.

Agents for appellants: *Martin & Leslie, for Webster, Will, & Ritchie, S.S.C., Edinburgh.*

Agents for respondent: *Loch & Co., for Dundas & Wilson, C.S., Edinburgh.*

[HOUSE OF LORDS.]

THE REV. ALFRED BROOK . . . . APPELLANT;

AND

RIGHT REV. J. B. K. KELLY AND OTHERS RESPONDENTS.

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Church—Voluntary Church—Contract—Trust—Canon's Stipend.

The rules of a cathedral belonging to the Scottish Episcopal Church provided that the clergy of the cathedral should be appointed by the bishop, and consist, inter alios, of three or more canons residentiary; further, that the temporal affairs of the cathedral should be vested in a board of management, with which should rest the administration of the funds, and the providing fitting support "for the provost and canons of the cathedral." Two out of the three canons appointed received from the board respectively £200 and £150 per annum. The third canon, the pursuer, claimed from the board an allowance, or if they had not sufficient funds that they should appropriate the £350 among the three canons:—

Held, affirming the decision of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie) 470), that the pursuer's action was irrelevant, no contract nor trust of which he was a beneficiary being established; and that the distribution of the funds was a matter entirely within the discretion of the defenders, which discretion could not be questioned so long as the funds were administered in good faith and applied to no other than cathedral purposes.

APPEAL from the Second Division of the Court of Session, Scotland (1).

The cathedral church of St. Andrew, Aberdeen, belongs to the Scottish Episcopal Church, and is managed under a code of statutes, of which statute 4 provided: "The clergy of the cathedral shall be appointed by the bishop, and shall consist of a provost and of three or more canons residentiary, who, together with the treasurer or other representative of the board of management, shall constitute the chapter. The clergy of the chapter shall hold their offices ad vitam aut culpam, and shall be subject to the canons of the Episcopal Church of Scotland."

Statute 13 provided that "the temporal affairs of the cathedral shall be vested in a board of management, consisting of the bishop and chapter, the several canonical lay representatives of the diocese, and the lay trustees of the cathedral. To this board is entrusted the management and administration of the funds of the cathedral (subject to the disposition of any persons who may hereafter confer gifts and endowments for behoof of the cathedral), the due ordering and arrangement of the congregation. . . . . With the board of management will rest the due provision for the maintenance of Divine Service and for the fitting support of the provost and canons of the cathedral."

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(1) 20 Court Sess. Cas. 4th Series (Rettie) 470.

The Rev. Alfred Brook, the appellant, raised this action "as a canon of the cathedral" against the respondents, the Right Rev. J. B. K. Kelly, the bishop, the other clergy constituting the chapter, the lay trustees of the cathedral, and others, "all the said individuals forming the board of management of the said cathedral church, as such board of management," for declarator that the board were bound to make due provision for the fitting support of the appellant as one of the canons of the cathedral out of the funds in their hands. The summons further concluded for payment of £150 annually, or such other sum as may be shewn to be available for the appellant's fitting support.

It appeared that prior to becoming a canon the appellant was in charge of the mission church of St. Andrew, at Tain, where he had a stipend of £150; that early in 1892 the respondent, Bishop Kelly, appointed the appellant supernumerary or diocesan chaplain, and on January of the same year the appellant was appointed by the bishop to the office and dignity of a canon, and invested with all the rights and privileges conferred by the statutes of the cathedral; that he entered on his duties of diocesan chaplain, but that on the 30th of March, 1892, the bishop terminated his tenure of that office as at the 30th of June (afterwards extended to the 30th of September), stating at the same time that the salary, £150, was wholly derived from that office, and must cease with the tenure of it. In these circumstances the appellant applied to the board of management for a fitting support; but the board declined to make any provision for the appellant. Hence the action.

The appellant averred that he laboured at Tain to the entire satisfaction of the respondent, the bishop, at whose request he resigned his position to enter on the more important work at the cathedral; that the bishop gave him to understand that at the cathedral he would have a stipend of not less than £150. He denied that the bishop informed him that his stipend was to be derived entirely from the office of diocesan chaplain. He further stated that, relying on the code of statutes, he accepted the canonry, and that he had continued to discharge the duties thereof; that the respondents had ample funds to provide fitting support for him, and that even if they had not funds over and above the £350 collectively paid to the other canons the board were bound to apportion that sum among the three canons.

The board answered, the appellant's duties in the office of diocesan chaplain were to perform such functions within the diocese under the immediate instructions of the bishop. The appointment was made by Bishop Kelly, whom they alleged informed the appellant that his stipend was to be derived entirely from that office. They had nothing to do with that appointment, and did not even receive information that it was made. They were not responsible for the salary attached thereto, the fund for payment of the supernumerary clergyman or diocesan chaplain being entirely independent of the finances of the cathedral. They had refused to provide for the appellant, they never having undertaken to do so. They also stated that the cathedral was supported by voluntary offerings, which were not in a position to meet the appellant's claim.

1892. Dec. 23. The Lord Ordinary (Wellwood) repelled the respondents' plea of irrelevancy, and allowed a proof as to whether there were sufficient funds to provide for the appellant.

1893. Mar. 3. The Second Division (Lord Trayner dissenting) recalled the Lord Ordinary's interlocutor and dismissed the action as irrelevant, and in a second interlocutor condemned the appellant in costs.

On appeal,

Aug. 3. The Lord Advocate (*J. B. Balfour*, Q.C.), and *George Watt* (of the Scotch Bar), for the appellant:—

The board of management have not exercised any discretion, for whether they had funds or not they met the claim of the appellant with a direct denial of his right. By the code of statutes the appellant as one of the canons has clearly a right to "fitting support." There is no ground whatever for the contention that a contract with the board is essential to such right. There was a contract with the bishop who has the appointment of the canons, and the board have a fiduciary trust to administer the funds in their hands to the persons to whom rights are given by the statutes.

The appellant alleged that the board had sufficient funds to provide him with support, and to prove that the Lord Ordinary allowed a proof.

The Solicitor General for Scotland (*Asher*, Q.C.), and *James C. Pitman* (of the Scotch Bar), for the respondents, were not called upon.

Lord Herschell, L.C.:—

In this action the pursuer, who is the appellant, and who is a canon residentiary of the cathedral church of St. Andrew, Inverness, seeks to have it found and declared that the defenders, the respondents, who are the board of management of that cathedral, "are bound to make due provision for the fitting support of the pursuer as one of the canons of the cathedral out of the funds in their hands." The summons concludes for "payment to the pursuer of the sum of £150 sterling annually, or such other sum as may be shewn in the course of the process to follow hereon to be available for the fitting support of the pursuer as a canon of the said cathedral."

My Lords, on the 2nd of January, 1892, the appellant was appointed to the office and dignity of a canon of the cathedral church by Bishop Kelly, and obtained no doubt under that appointment all the rights to which any canon of that cathedral church was as such entitled, whatever those might be. The cathedral church of Inverness and the canons residentiary are of course not bodies having any legal status. The rights of the officials of that church must be determined on the ordinary principles of law in the same way as those of members of any other voluntary association. The appellant places his reliance upon the 13th statute of the Code of Statutes of the Cathedral Church of St. Andrew, which appear to have been approved and accepted by the synod of the united diocese held in the cathedral in October, 1869, and consented to by the chapter and ratified by the bishop in November, 1869. The 4th of those statutes provides that "the clergy of the cathedral shall be appointed by the bishop, and shall consist of a provost and of three or more canons residentiary, who together with the treasurer or other representative of the board of management shall constitute the chapter. The clergy of the chapter shall hold their offices ad vitam aut culpam, and shall be subject to the canons of the Episcopal Church of Scotland." The 13th statute is in these terms: "The temporal affairs of the cathedral shall be vested in a board of management consisting of the bishop and chapter, the several canonical lay representatives of the diocese, and the lay trustees of the cathedral. To this board is entrusted the management and administration of the funds of the cathedral (subject to the disposition of any persons who may hereafter confer gifts and endowments for behoof of the cathedral), the due ordering and arrangement of the congregation and the maintenance of order during Divine Service, the appointment of the necessary officials except as above provided for, and the care and preservation of the buildings. With the board of management will rest the due provision for the maintenance of Divine Service and for the fitting support of the provost and canons of the cathedral." The appellant places his reliance upon the concluding words which I have just read: "With the board of management will rest the due provision for the maintenance of Divine Service and for the fitting support of the provost and canons of the cathedral."

Now, the appellant claimed that the board of management should allot to him an annual stipend out of the funds in their hands. They declined to do so; they denied that there was any obligation upon them in point of law to do so; and thereupon the present action was brought. The averments upon which the appellant relies are these—after alleging his intimation of a request to the board of management to be provided with a fitting support for him in terms of sect. 13, he avers that on the 4th of April he received an extract from the minutes of a meeting of the board held on the 1st of April, which bore that they "declined to make any provision for the pursuer." The 6th condescendence adds the fact that two other canons are being paid respectively £200 and £150, and avers that "the defenders have funds amply sufficient to provide fitting support for the pursuer," and, further, that "even if" they "had not funds over and above the £350 paid to the other canons (which is denied) they are bound to apportion the same among the three canons."

The action having been determined in the Court below on the question of relevancy, of course no regard can be had to disputed averments; but it is important to notice that the appellant does not aver that there are any funds in the hands of the board of management specifically dedicated or set apart for the fitting support of the provost and canons. There is only the general averment that they "have funds amply sufficient to provide fitting support for the pursuer"; that is to say, that out of the general moneys which are in their hands to be administered there is enough to make a certain payment to the appellant which would be sufficient for his support.

The appellant can of course only maintain this action on one of two grounds, either by shewing that under contract the board of management are subject to an obligation to make him the payment he seeks, or by shewing that the board of management are trustees holding in trust a fund of which he is in part a beneficiary, and therefore entitled to insist that they shall apply so much as they hold in trust for him as such beneficiary to that purpose. My Lords, it seems clear that no contract has been entered into under which the board of management are bound to pay him the stipend for which he asks or any sum of money whatsoever; indeed the arguments mainly turned upon the contention that the board of management hold their funds upon a trust in respect of which he is a beneficiary. Now, it is to be observed that the board of management is entrusted in the fullest and most general terms with the management and administration of the funds of the cathedral, subject only to this, that if any person confers gifts or endowments upon the cathedral for any particular object or objects those funds are to be held for that object or those objects. Apart from that the management and administration of the whole of the funds is entrusted to the board of management, with the fullest and most ample discretion as to the use of those funds, the limit being of course that they can only apply them to cathedral purposes.

My Lords, if the statute had stopped there I do not think it would have been possible seriously to raise the arguments which your Lordships have heard on behalf of the appellant. But reliance is placed upon the words which follow in the 13th statute, namely, "with the board of management will rest the due provision for the maintenance of Divine Service and for the fitting support of the provost and canons of the cathedral." Now, my Lords, I confess it seems to me that one important object in view in the insertion of those words was to impress upon the board of management that it was their duty to obtain, as far as they could, funds which would pay for the maintenance of Divine Service and for the fitting support of the provost and canons. It cannot of course for a moment be questioned that an obligation of that kind was a discretionary obligation, at most a moral obligation, which imposed no sort of legal duty which any one could enforce upon the board of management. My Lords, it may well be that within those words there was also included an indication that the board of management were to have regard to the fact that in administering the fund due provision should be made for the maintenance of Divine Service, and fitting support provided for the provost and canons of the cathedral. But it appears to me that having these objects in view the mode in which they were to administer the funds in their hands, so far as they were not specifically dedicated, was entirely left to their discretion, and that there is nothing in this statute which would give to any person a legal right to complain of that administration so long as that administration was in good faith and the funds were applied to no other than cathedral purposes.

For these reasons, my Lords, I think that the judgment of the Court below ought to be affirmed. I should, perhaps, add that I cannot regard any sums which have heretofore been paid to the other canons residentiary as indicating that there are funds

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in the hands of the board of management specially dedicated to the support of the canons, or as giving the appellant any right to claim a portion of the salaries which have been paid to the other canons. I think in order to do that it would be necessary for him to shew a fund vested in the trustees for the use of all the canons of the cathedral, so that the distribution of those funds amongst a portion of those canons would be a violation of the trust. And, my Lords, certainly the argument of the appellant goes, and I think must go, a long way. I do not see how, under the words of the statute, it is possible to make any distinction between the position of a fourth, fifth, or sixth canon and the position of the first three canons who might be appointed. They all become canons residentiary; there is no limitation of number in the statute, and, although three is the number contemplated as the minimum, I do not see that the rights of the fourth, fifth, or sixth would be any worse or more limited than the rights of the first, second, and third. The contention must therefore go this length—that, however many canons residentiary the bishop appoints, all who fill that office would be in the same position, entitled to make the same claim and to assert their right to a portion of the funds in the hands of the board of management. I think, my Lords, that this goes far to shew that the contention of the appellant cannot be well founded, and that the judgment ought to stand, and I so move your Lordships.

LORD WATSON:—

In this case two points are clear, first, that there is no contract between the reverend appellant and the board of management; and, in the second place, that it is not averred that there are funds held by the board which have been specially dedicated by the donors to the support of the canons residentiary. In these circumstances it must be assumed that any funds which the pursuer alleges to be in the hands of the board are funds collected by them for cathedral purposes in terms of the 13th statute of the code of statutes. Now, in my opinion, that statute gives the board an unlimited discretion with respect to the administration of these funds. So long as they are used for cathedral purposes it is for the board and for the board alone to determine at what time,

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in what way, or for what particular purpose they shall be applied. The statute gives canons residentiary no beneficial interest in these funds save what the board may choose to accord to them.

On these grounds, I am of opinion that the judgment of the Second Division is right.

LORD MACNAGHTEN :—

I concur. I agree entirely with the opinion of Lord Rutherfurd Clark. I do not think that the appellant has any right to insist on having provision made for him out of the funds in the hands of the board of management not appropriated by the subscribers to any specific purposes. It seems to me that the board of management have an absolute and unfettered discretion as to the administration of the funds in their hands within the limits prescribed by the statute for the cathedral church. The appellant's only right, if it can be called a right, is a right to be recognised as one of a class for whom the board of management may, if they think fit in their discretion, make provision.

Interlocutors appealed from affirmed with costs.
Lords' Journals, 3rd August, 1893.

Agent for appellant: *A. Beveridge, for David A. Ross, S.S.C., Edinburgh.*

Agents for respondents: *Grahames, Curry, & Spens, for J. & F. Anderson, W.S., Edinburgh.*